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Supreme Court of the United States

OCTOBER TERM, 1965

No. 346 //

CANADA PACKERS, LIMITED, PETITIONER,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 14, 1965
CERTIORARI GRANTED FEBRUARY 21, 1966

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14659

CANADA PACKERS, LIMITED, Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY, ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, WABASH RAILROAD COMPANY, Defendants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable Hubert L. Will, District Judge.

Appendix to Brief of Defendants-Appellants—Filed June 19, 1964

[File endorsement omitted]

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

(Caption—63 C 1495)

COMPLAINT—Filed August 21, 1963

Comes now the plaintiff, Canada Packers, Limited, by its undersigned attorney, and alleges:

1. That this is an action to enforce an order of the Interstate Commerce Commission and this court has

jurisdiction under the provisions of Section 16(2) of the Interstate Commerce Act, 49 U. S. C. A. Sec. 16(2).

2. That plaintiff is a corporation duly organized and existing under the laws of the Dominion of Canada, with principal place of business at Toronto, Ontario. That plaintiff is engaged, among other things, in the manufacture of fertilizer at plants located in the Provinces of New Brunswick, Ontario and Quebec, Canada.

3. That each of the above-named defendants is a common carrier by railroad in interstate commerce and as such is subject to the Interstate Commerce Act, 49 U. S. C. A. Sec. 1, et seq.

4. That defendant The Atchison, Topeka and Santa Fe Railway Company has its principal operating office in and its road runs through the Northern District of Illinois.

5. That during the period January 5, 1948 through May 5, 1948, defendants transported numerous carload shipments of potash from Carlsbad and Loving, New Mexico, to plaintiff at Toronto, West Toronto and Welland, Ontario; Montreal, Quebec; and St. John, New Brunswick, Canada.

6. That defendants demanded and collected, and plain-
[fol. 5] tiff paid and bore, rates and charges on said shipments which were unjust and unreasonable in violation of Section 1 of said Interstate Commerce Act.

7. That in 1950 and within the applicable period of limitations, plaintiff filed an informal complaint with the Interstate Commerce Commission alleging that said rates and charges were unlawful and seeking money damages.

8. That action on said informal complaint was deferred awaiting decisions in similar cases then pending before the Interstate Commerce Commission involving like rates and charges.

9. That on or about May 13, 1959, plaintiff was informed by said Commission that plaintiff's informal complaint was not susceptible of informal handling and plaintiff on October 28, 1959 and within the applicable period of limitations, filed a formal complaint with said Commission alleging said rates and charges were unlawful and incorporating the foresaid informal complaint by reference. Copy of said formal complaint, identified as Exhibit A, is attached hereto and made a part hereof.

10. That Division 2 of said Commission, in its report of May 24, 1961, found said rates unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act and determined just and reasonable rates and further found, plaintiff was entitled to reparation in the amount of the difference between the charges collected and those that would have accrued at the rates found just and reasonable. Copy of said report, identified as Exhibit B, is attached hereto and made a part hereof.

[fol. 6] 11. That said defendants filed a petition for reconsideration of the report and order of May 24, 1961 which petition was denied by the Commission by order of October 9, 1961. Copy of said order, identified as Exhibit C, is attached hereto and made a part hereof.

12. That on August 28, 1962 the Commission, by its chairman, having under consideration Division 2's report of May 24, 1961 and certain statements, known as Rule 1.100 Statements, filed by plaintiff and agreed to by the defendants therein, showing, among other things, the dates the charges were paid on the ship-

ments in question, entered an order authorizing and directing said defendants to pay plaintiff specified amounts of reparation plus interest at the rate of four percent per annum, from the dates of payment of the charges assailed. Copy of said order, identified as Exhibit D, is attached hereto and made a part hereof.

13. That the order of August 28, 1962 (Exhibit D) directed the defendants parties to this complaint and their Canadian connecting carriers, the Canadian National Railways and the Canadian Pacific Railway Company, to pay plaintiff reparation in principal amounts totaling $6,694.56 plus interest as aforesaid.

14. That defendants herein have paid to plaintiff reparation totaling $5,304.01 plus interest but have refused and continue to refuse to fully comply with said order by withholding payment to plaintiff of $1,390.55 plus interest.

15. That by reason of defendants' wrongful refusal to comply with the Commission's order of August 28, 1962, plaintiff is damaged in the sum of $1,390.55 plus interest.

[fo' 7] Wherefore, plaintiff prays judgment against defendants for:

(a) Damages in the sum of $1,390.55 plus interest at the rate of four percent per annum, from the dates on which payment of the charges assailed were paid, to and including the date of judgment herein.

(b) Allowance of a reasonable attorney's fee to be taxed as part of the costs of this action as authorized by Section 16(2) of said Interstate Commerce Act.

(c) Plaintiff's costs of this action, and such other relief as this court deems proper in the premises.

Canada Packers, Limited, Plaintiff, By Charles B. Myers, Its Attorney.

Charles B. Myers, 611 Field Building, Chicago 3, Illinois, CE. 6-5757.

[fol. 8]

EXHIBIT A TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

COMPLAINT

CANADA PACKERS, LIMITED,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY

COMPANY, ET AL.

A. C. Listak,
R. W. Schapanski,
111 North Canal Street,
Chicago 6, Illinois,

Practitioners.

Dated at Chicago This 28th Day of October, 1959.

[fol. 9]

BEFORE THE INTERSTATE COMMERCE COMMISSION

COMPLAINT

CANADA PACKERS, LIMITED, Complainant,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CANADIAN NATIONAL RAILWAYS; CANADIAN PACIFIC RAILWAY COMPANY; THE CHESAPEAKE AND OHIO RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD; DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY; ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; GRAND TRUNK WESTERN RAILROAD COMPANY; GREEN BAY AND WESTERN RAILROAD COMPANY; THE NEW YORK CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY; SOUTHERN PACIFIC COMPANY; TRONA RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; WABASH RAILROAD COMPANY, Defendants.

The complaint of the above-named complainant respectfully shows—

I.

That complainant is a corporation engaged in the meat packing business and various other products, including the manufacture of fertilizer, operating plants at various locations throughout the Dominion of Canada, with principal office at Toronto, Ontario.

[fol. 10]

II.

That the defendants above named are common carriers by railroad engaged in the transportation of property between points in the States of California and New Mexico

on the one hand and points in the Provinces of New Brunswick, Ontario and Quebec in the Dominion of Canada on the other, and as such defendants are subject to the provisions of the Interstate Commerce Act.

III.

That during the period of January 5, 1948 through May 5, 1948 numerous carload shipments were made to complainant at St. John, New Brunswick; Toronto, Ontario; West Toronto, Ontario; Welland, Ontario and Montreal, Quebec, which originated at Trona, California; Loving and Carlsbad, New Mexico, variously described as Potash, Potash Salts, Muriate or Potash, Sulphate of Potash Magnesia, Sulphate of Potassium of Magnesia, Manure Salts, all of which are commonly referred to as Potash.

That freight charges were paid by complainant on basis of the applicable commodity rates published in Atchison, Topeka & Santa Fe Railway Company Tariff 15169-F, ICC 14478, and Transcontinental Freight Bureau Tariff 3-S, Agent L. E. Kipp's ICC 1519, increased by 20% under Tariff of Emergency Charges X-166, Agent L. E. Kipp's ICC A-3684, Supplement 2, Item 10-A thereof, which became effective January 5, 1948.

That effective May 6, 1948 in Tariff of Increased Rates and Charges X-166-A, Agent L. E. Kipp's ICC A-3691, in Item 203 a maximum increase of $1.60 per net ton was published to apply on Potash pursuant to the third report in *Ex Parte 166, Increased Freight Rates, 1947, 270 ICC 93,* finding No. 14.

[fol. 11] IV.

That two informal complaints were filed to cover the shipments described in Paragraph III hereof as follows—ICC Informal Complaint No. 179998, covering the shipments originating at Trona, California, on which the Commission advised complainant under date of June 30, 1959 that the file was being closed based on letter received from

Mr. E. J. Larson, F.T.M., Southern Pacific Company, San Francisco, his File F-3057-1-2.

ICC Informal Complaint No. 180056, covering the shipments made from Carlsbad and Loving, New Mexico, on which the Commission advised complainant under date of May 13, 1959, that its file was being closed in accordance with letter received from Mr. H. C. Vincent, T.M., Panhandle & Santa Fe Railway Company, Amarillo, Texas, his File M-4062-2926.

That the papers in these informal complaints should be incorporated with this formal complaint.

V.

That on the traffic described in Paragraph III hereof the applicable joint through rates in effect during the period of January 5, 1948 through May 5, 1948 were unreasonable to the extent that the interim increase of 20% exceeded the maximum increase of $1.60 per net ton.

VI.

That by reason of the facts stated in the aforementioned paragraphs, the complainant has been subjected to rates which were, when exacted, unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act. That complainant has been injured thereby to its damage in the sum of seven thousand ninety-one and 48/100 ($7091.48) dollars.

[fol. 12] Wherefore, complainant prays that defendants be severally required to answer charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them, to pay to complainant by way of reparation for the unlawful charges hereinbefore alleged, the sum of $7091.48 or such other sum as in view of the evidence to be adduced herein the Commission shall determine that complainant is entitled to as an award of damages under the provisions of said Act for violation

thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Illinois, this 28th day of October, 1959.

Canada Packers, Limited, Toronto 9, Ontario;

A. C. Listak, Practitioner, 111 North Canal Street, Chicago 6, Illinois;

R. W. Schapanski, Practitioner, 111 North Canal Street, Chicago 6, Illinois.

[fol. 13]

EXHIBIT B TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Date of Service
June 5, 1961

No. 33261

CANADA PACKERS, LIMITED,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *et al.*

Decided May 24, 1961

Rates charged on potash, in carloads from Carlsbad and Loving, N. Mex., and Trona, Calif., to Toronto, West Toronto, and Welland, Ontario, Montreal, Quebec, and St. John, New Brunswick, Canada, found to have been unjust and unreasonable. Just and reasonable rates determined, and reparation awarded.

N. C. Jensen, A. C. Listak, and R. W. Schapanski for complainant.

Charles W. Burkett, Jr., Harvey Huston, and J. Edgar McDonald for defendants.

Report of the Commission

Division 2, Commissioners Freas, Goff, and Herring.

By Division 2:

Exceptions to the report recommended by the examiner were filed by the defendants, and the complainant replied. [fol. 14] Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on October 30, 1959, the complainant, a corporation with its principal office in Toronto, Ontario, Canada, alleges that the rates[1] charged on numerous carload shipments of potash from Trona, Calif., and Carlsbad and Loving, N. Mex., to the Canadian destinations of St. John, New Brunswick; Welland, Toronto, and West Toronto, Ontario; and Montreal, Quebec, during the period January 5 through May 5, 1948, were unjust and unreasonable to the extent that they included the 20 percent increases authorized on an interim basis in Ex Parte No. 166,[2] instead of the maximum increase of $1.60 which was finally authorized in that proceeding. Reparation only is sought.

On January 16, 1950, two informal complaints were filed with this Commission covering the shipments here concerned. One alleged to cover 132 shipments from Carlsbad and Loving to St. John, Montreal, West Toronto, and Welland was declined on May 13, 1959, as not susceptible of informal adjustment. The other, covering 5 shipments from Trona to Toronto and St. John, was declined on June 30, 1959. Both of these informal complaints had been

[1] Rates are stated per net ton.

[2] *Increased Freight Rates, 1947*, 269 I. C. C. 33, 270 I. C. C. 81, 270 I. C. C. 93, and 270 I. C. C. 403.

held in abeyance pending disposition of *Consolidated Rendering Co.* v. *Atchison, T. & S. F. Ry. Co.*, 287 I. C. C. 673, 300 I. C. C. 87, hereinafter called the *Consolidated Rendering* case or decision, and related proceedings, which embraced the same principal issue and the same commodity, [fol. 15] among others. Shipments covered by the informal complaints which were delivered or tendered for delivery prior to January 16, 1948, are barred from our consideration by section 16(3) of the Interstate Commerce Act.

Pending a final decision in Ex Parte No. 166, the Commission authorized two interim increases. The first, an interim increase of 10 percent effective on October 13, 1947, was superseded by an interim increase of 20 percent on January 5, 1948. Subsequently, the Commission authorized permanent increases ranging from 20 to 30 percent, subject to maximum increases or holddowns on certain commodities, including a $1.60 holddown in the increases on fertilizer materials, which include the instant commodity. This maximum became effective on May 6, 1948.

In its exhibit No. 1 the complainant lists 136[3] carloads of potash as having been shipped during the reparation period, as follows: 81, 20, 22, and 7 from Carlsbad to Toronto,[4] Welland, Montreal, and St. John, respectively, 4 and 1 from Trona to Toronto, and St. John, respectively, and 1 from Loving to St. John. The shipments ranged in weight from 80,100 to 122,800 pounds averaging 102,399 pounds, and crossed the border apparently at several eastern points, including Port Huron or Detroit, Mich., and Buffalo, N. Y.

In the table below are set forth the basic rates on this commodity which were applicable prior to October 13, 1947; from that date as a result of the first interim in-

[3] Although references are made at various points in the evidence and pleadings to 138 carloads, only 136 carloads are listed in the exhibit.

[4] The destination of the 81 shipments is also referred to at times as West Toronto.

crease authorized in Ex Parte No. 166; from January 5, 1948, as a result of the second interim increase in that pro- [fol. 16] ceeding; and on May 6, 1948, as a result of the increase and holddown finally authorized therein:

TABLE I.

From Trona, Calif., to—	Basic rates	Rates effective on Oct. 13, 1947	Jan. 5, 1948	May 6, 1948
Toronto, Ont.	$15.00	$16.50	$18.00	$16.60
St. John, N. B.	18.20	20.02	21.84	19.80
From Carlsbad— Loving, N. Mex. to—				
Toronto, Ont.	12.20	13.42	14.64	13.80
Welland, Ont.	12.20	13.42	14.64	13.80
Montreal, Que.	14.40	15.84	17.28	16.00
St. John, N. B.	17.00	18.70	20.40	18.60

The complainant paid and bore the charges complained of at the rates which were applicable during the reparation period. Its basic contention is that those rates were unreasonable to the extent that they exceeded the basic rates plus the maximum increase of $1.60 finally authorized in Ex Parte No. 166, and that all that is sought here is the same treatment as was accorded to other shippers of potash from the same origin areas to other destinations during the same interim period following the decision on further hearing in the *Consolidated Rendering* case.

In the *Consolidated Rendering* case, the Commission found that the rates charged on shipments of potash, *inter alia,* moved from Carlsbad and Trona, among other origins, to various destinations during the period January 5 through May 5, 1948, were unjust and unreasonable to the extent that they included Ex Parte No. 166 interim increases in excess of those finally authorized in that proceeding. Reparation was awarded on that basis.

The defendants claim that the foregoing decision has no relevance to the instant proceeding, for the reason that

the charges here concerned "were not computed on prescribed basic rates." The inference is that all of the rates on this commodity which were found unreasonable in the *Consolidated Rendering* case had been basically prescribed by the Commission. This is incorrect. On page 682 of the [fol. 17] first report in that proceeding appears the following statement:

> Rates were not prescribed for application on potash destined to Canada, but the rates to Canada were based on prescribed rates to points in the United States. The rates assailed to Canadian points were relatively somewhat higher than the prescribed rates to destinations in the United States.

The instant record shows that reparation on the prescribed basis was later ordered paid in that proceeding on shipments to at least one Canadian destination. While most of the rates found unreasonable therein had been basically prescribed as maximum reasonable, this was not true of a number of other rates which also were found unreasonable and for which the same reparation basis was prescribed.

While the defendants have cited *Virginia-Carolina Chemical Corp.* v. *Alabama, G. S. R. Co.*, 306 I. C. C. 290, and *Western Peat Co.* v. *Great Northern Ry. Co.*, 308 I. C. C. 541, in support of their contention that the *Consolidated Rendering* decision has no application in the instant proceeding, these citations are not in point here. Neither of these cases holds that the Commission's refusal to grant reparation stems from the fact that the *Consolidated Rendering* decision required such a result because the assailed rate was not on a prescribed basis. In the *Western Peat Co.* case, the Commission's decision was based on the fact that the evidence before it would not support a finding that the assailed rates were unjust and unreasonable. The complainant had the burden of showing that its own rates were unjust and unreasonable, and it had not met that burden

simply by showing that awards of reparation had been made in other cases where greater interim increases than those authorized in final general increase proceedings were applied. In the *Virginia-Carolina* case, the Commission found that the rate comparisons submitted by the complainant were inappropriate and found, in effect, that since the [fol. 18] rate in question compared favorably with a prescribed rate to a more appropriate destination, it had not been shown to be unjust and unreasonable. In neither case did the Commission deny reparation solely for the reason that the charges involved did not include prescribed basic rates.

Reasonable maximum rates from the three origins here concerned to territories east of the Rocky Mountains, including official territory, were prescribed in three proceedings: No. 29202, *Potash Co. of America* v. *Aberdeen & R. R. Co.*, 264 I. C. C. 401; *American Potash & Chemical Corp.* v. *Aberdeen & R. R. Co.*, 258 I. C. C. 743, 262 I. C. C. 157; and *Potash Co. of America* v. *Aberdeen & R. R. Co.*, 258 I. C. C. 109. The Commission has no power to prescribe rates for the future to destinations in Canada and such rates have not been prescribed to the instant destinations.

Based on short-line distances and an average load of 51.15 tons per car, the basis used in the *Consolidated Rendering* case, the following table shows the distances and rates from Carlsbad, a representative origin, and the car-mile earnings to selected destinations on basis of which reparation was awarded in that proceeding, as compared with the rates here sought on the same basis:

TABLE II.

From Carlsbad, N. Mex., to—	Distance (miles)	Rates[1] assailed	Reparation rates[2]	Rates here sought[3]	Car-mile earnings under basis sought (cents)
Detroit, Mich.	1,515	$13.32	$12.70	$	42.9
Buffalo, N. Y.	1,747	14.04	13.30		38.9
Welland, Ont.	1,728	14.64		13.80	40.8
Toronto, Ont.	1,741	14.64		13.80	40.5
New York, N. Y.	2,100	15.12	14.20		34.6
Montreal, Que.	2,075	17.28		16.00	39.4
Vanceboro, Maine	2,461	17.28	16.00		33.3
St. John, N. B.	2,551	20.40		18.60	37.3
Caribou, Maine	2,589	18.60	17.10		33.8

1. Basic rates plus the 20 percent interim increase authorized in Ex Parte No. 166.

2. Rates incorporating the final increase authorized in Ex Parte No. 166, on which basis reparation was awarded in the *Consolidated Rendering* case.

3. Basic rates to the Canadian destinations, plus the maximum increase finally authorized in Ex Parte No. 166.

[fol. 19] Table II shows that to destinations in the northeastern part of the United States the rates on the basis prescribed for reparation purposes in the *Consolidated Rendering* case, and the car-mile revenue thereunder, are lower than the corresponding rates here sought, and the earnings thereunder, to these Canadian destinations. This is further illustrated by the rates to four other representative eastern destinations, Baltimore, Md., Carteret, N. J., Houlton, Maine, and Lowell, Mass., to which the car-mile earnings resulting from the prescribed reparation basis ranged from 34 to 37.2 cents for distances ranging from 1,747 to 2,551 miles. The basis sought here would produce car-mile earnings ranging from 40.8 cents for 1,728 miles to 37.3 cents for 2,551 miles. Over the actual routes used by these shipments, the car-mile earnings on the basis sought

would range from 39.9 cents for 1,769 miles to 26 cents for 3,900 miles.

In 1943, the rates from Carlsbad, for example, were $13.20 to Montreal, $12.80 to New York, and $13.80 to Boston. Thus, at that time the Montreal rates were 40 cents higher than that to New York and other points in trunk-line territory and 60 cents under that to Boston and other points in New England. As a result of the decision in No. 29202, *supra*, the rate to New York was reduced to $11.40, $1.80 less than to Montreal, and the rate to Boston was reduced to $11.90, $1.30 under Montreal. So also, in 1943 the rate from Carlsbad to Buffalo, Toronto, and Welland was $11, reflecting the fact that the short-line distances to all three destinations are approximately the same. Following the No. 29202 reductions, the rate to Buffalo became $10.50, notwithstanding that the distance to Buffalo is greater than that to Welland and Toronto, and that over some of the routes Welland and Toronto are intermediate to Buffalo.

The defendants except to the recommended finding of the [fol. 20] examiner as to the measure of damages, claiming that even if a reparation award is appropriate, it may not be measured "in a manner beyond the jurisdiction of the Commission." They contend that the reparation award may not exceed the award made in the *Consolidated Rendering* case to the border points at which these shipments crossed into Canada.

As has been pointed out, in the *Consolidated Rendering* case reparation was awarded on shipments which had moved, as here, at joint through rates to Canadian destinations. The law in this respect is correctly stated in *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co.*, 279 I. C. C. 710, 712, wherein Division 3 said:

> . . . It is well settled that railroads within this country have a clear alternative in respect of their participation in international traffic. They may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates,

or they may participate in joint through international rates and become jointly or severally liable for any unlawfulness found in such rates. • • •

See also, *Cyanamid and Cyanide from Niagara Falls*, 155 I. C. C. 488; *Western Peat Co.* v. *Illinois Central R. Co.*, 297 I. C. C. 273, 275; *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U. S. 179; and *Lewis, etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654.

We find that the assailed rates were unjust and unreasonable to the extent that they exceeded rates from Carlsbad and Loving of $13.80 to Toronto, West Toronto, and Welland; $16 to Montreal, and $18.60 to St. John; and from Trona, of $16.60 to West Toronto and $19.80 to St. John.

We further find that the complainant made the shipments as described, paid and bore the charges thereon, was damaged thereby, and is entitled to reparation in the [fol. 21] amount of the difference between the charges collected and those that would have accrued at the rates herein found just and reasonable. The complainant should comply with rule 1.100 of the General Rules of Practice.

By the Commission, division 2.

Harold D. McCoy,
Secretary.

(Seal)

EXHIBIT C TO COMPLAINT

Service Date
October 17, 1961

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 9th day of October, A. D. 1961.

No. 33261

CANADA PACKERS, LIMITED,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Upon consideration of the record in the above-entitled proceeding, petition, filed July 5, 1961, of defendants for reconsideration of the report and order of Division 2, decided May 24, 1961, and petition, filed July 5, 1961, of defendants, Canadian Pacific Railway Company and Canadian National Railway Company, for modification of decision and dismissal as parties defendant herein, complainant's reply to petition for reconsideration, filed July 17, 1961, and reply of defendants other than Canadian Pacific and Canadian National to petition for modification and dismissal, filed July 24, 1961;

[fol. 22] *It is ordered,* That the said petitions be, and they are hereby, denied, for the reason that the matters submitted in support thereof do not constitute substantial and material grounds to warrant granting the action sought.

By the Commission.

Harold D. McCoy,
Secretary.

(Seal)

EXHIBIT D TO COMPLAINT

Service Date
September 4, 1962

ORDER

INTERSTATE COMMERCE COMMISSION

No. 33261

CANADA PACKERS, LIMITED,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

In the Matter of Awarding Reparation Based on Rule 1.100 Statements Filed Herein.

Present: Rupert L. Murphy, Chairman, to whom the above-entitled matter has been assigned for action thereon.

It appearing, That on May 24, 1961, the Commission, by division 2, intered its report in the above-entitled proceeding which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing, among other things, the dates on which payment of the charges assailed was made; we [fol. 23] find that complainant Canada Packers, Limited is entitled to awards of reparation from the defendants named in the following table, insofar as the transportation took place over their lines in the United States, in the amounts set opposite their respective names, with interest:

Defendants	Amounts
ATSF-CSS&SB-GTW-CNR	$494.96
ditto	88.24
ATSF-GTW-CNR	328.71
ditto	260.69
ditto	159.76
ditto	126.12
ATSF-EJ&E-C&O-CPR	311.38
ATSF-CSS&SB-NYC-CPR	320.11
ATSF-CSS&SB-WAB-CPR	139.09
ATSF-CSS&SB-NYC-CPR	421.16
ditto	449.07
ditto	427.18
ATSF-GTW-CNR	140.82
ATSF-CSS&SB-GTW-CNR	302.53
ditto	348.67
ATSF-CSS&SB-WAB-GTW-CNR	95.84
ATSF-CSS&SB-WAB-CPR	800.44
ATSF-CSS&SB-WAB-CPR	198.91
ATSF-CSS&SB-NYC-CPR	411.30
ATSF-NYC&STL-DT&I-CPR	65.34
ATSF-CSS&SB-GTW-CNR	522.81
ATSF-EJ&E-C&O-CPR	180.54
ATSF-CSS&SB-NYC-CPR	100.89
TRONA-SP-UP-CMSTP&P-GB&W-PM (C&O)-CPR	70.38
TRONA-SP-CRIP-GTW-CNR	257.41
TRONA-SP-UP-CMSTP&P-GB&W-PM (C&O)-CPR	70.13

It is therefore ordered, That the defendants named in each of the groups shown in the above table (the full corporate names of which are shown in the attached index of abbreviations), be, and they are hereby, authorized and [fol. 24] directed to pay unto the complainant, Canada Packers, Limited on or before October 12, 1962, the amounts set opposite their respective names in said table, with inter-

est thereon at the rate of 4 percent per annum, from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rates charged and collected for the transportation of numerous carloads of potash during the period January 5 to May 5, 1948, both dates inclusive, from Carlsbad and Loving, N. Mex., and Trona, Calif., to Toronto, West Toronto, and Welland Jct., Ont., Montreal, Que., and St. John, N. B., Canada, insofar as the transportation took place in the United States.

Dated at Washington, D. C., this 28th day of August, A. D. 1962.

By the Commission, Chairman Murphy.

Harold D. McCoy,
Secretary.

(Seal)

[fol. 25]

Index of Abbreviations.

ATSF	—The Atchison, Topeka and Santa Fe Railway Company
CNR	—Canadian National Railways
CPR	—Canadian Pacific Railway Company
C&O	—The Chesapeake and Ohio Railway Company
CRIP	—Chicago, Rock Island and Pacific Railroad Company
CMSTP&P	—Chicago, Milwaukee, St. Paul and Pacific Railroad Company
CSS&SB	—Chicago, South Shore and South Bend Railroad
DT&I	—Detroit, Toledo and Ironton Railroad Company
EJ&E	—Elgin, Joliet and Eastern Railway Company
GTW	—Grand Trunk Western Railroad Company
GB&W	—Green Bay and Western Railroad Company
NYC	—New York Central Railroad Company
NYC&STL	—The New York, Chicago and St. Louis Railroad Company
SP	—Southern Pacific Company
TRONA	—Trona Railway Company
UP	—Union Pacific Railroad Company
WAB	—Wabash Railroad Company

[fol. 26]

IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed October 7, 1963

The defendants, by and through their attorneys, Floyd Stuppi, Gus Svolos, and Harvey Huston, hereby answer the complaint heretofore filed, stating:

1. Defendants admit the allegations of paragraphs 1, 3, 5, 7, 8, 9, 11 and 13 of the complaint.

2. Defendants are without information concerning the allegations in paragraph 2, and therefore neither admit nor deny such allegations but demand proof thereof.

3. Defendants deny that The Atchison, Topeka and Santa Fe Railway Company's principal operating office is in Chicago, and admit all other allegations of paragraph 4.

4. Defendants deny the allegations of paragraph 6.

5. Defendants deny that the rates referred to in paragraph 10 were unjust or unreasonable, and admit that Exhibit B to the complaint is a copy of the Interstate Commerce Commission report referred to.

6. Defendants deny the allegation in paragraph 12 that defendants agreed to the Rule 1.100 statements, and state that defendants merely certified that the information contained in said statements was compiled accurately. Defendants admit all other allegations of paragraph 12.

7. Defendants admit the allegations in paragraph 14 concerning moneys paid and moneys withheld but deny that defendants refused to comply fully with the provisions of the order referred to, and aver that said order is beyond the statutory powers of the Interstate Commerce Commission if interpreted in the manner sought by complainant.

8. Defendants deny the allegations of paragraph 15.

[fol. 27] Wherefore, defendants pray that the relief and damages sought by plaintiff be denied and that judgment be entered in their favor and for their costs.

The Atchison, Topeka and Santa Fe Railway Company, The Chesapeake and Ohio Railway Company, Chicago, South Shore and South Bend Railroad, Detroit, Toledo and Ironton Railroad Company, Elgin, Joliet and Eastern Railroad Company, Grand Trunk Western Railroad Company, New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Wabash Railroad Company, *Defendants.*
By Floyd Stuppi, Gus Svolos, Harvey Huston.

Floyd Stuppi, Gus Svolos, Harvey Huston, 1211 Railway Exchange, 80 East Jackson Boulevard, Chicago 4, Illinois, HArrison 7-4900.

[fol. 28]

IN THE UNITED STATES DISTRICT COURT
Northern District Illinois

(Date) December 16, 1963

Preliminary pre-trial conference held. Cause submitted to the Court on stipulation of facts & briefs, said stipulation to be filed by Jan. 15, 1964, plaintiff's brief to be filed by Jan. 30, 1964, defendants' brief to be filed by Feb. 10, 1964 and plaintiff's reply brief to be filed by Feb. 17, 1964.

Will, J.

IN THE UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed January 15, 1964

1.

Plaintiff is a corporation duly organized and existing under the laws of the Dominion of Canada, with its principal place of business at Toronto, Ontario. Plaintiff is engaged, among other things, in the manufacture of fertilizer at plants located in the Provinces of New Brunswick, Ontario, and Quebec, Canada.

2.

Each of the defendants is a common carrier by railroad in interstate commerce.

3.

On July 3, 1947, the defendants, and substantially all other railroads of the United States, petitioned the Interstate Commerce Commission for an increase in their rates and charges on interstate and foreign commerce.

[fol. 29]

4.

The Commission, in *Ex Parte 166, Increased Freight Rates, 1947*, 269 I. C. C. 33, 54, authorized an interim increase of 10 per cent in rates and charges, which became effective October 13, 1947. That increase was superseded by an interim increase of 20 per cent authorized in 270 I. C. C. 81, 90, which became effective January 5, 1948.

5.

Thereafter, in a later report in that proceeding in 270 I. C. C. 93, 100, the Commission authorized permanent increases on interstate and foreign commerce, ranging from 20 to 30 per cent, subject to maximum increases or hold-

downs on certain commodities, including a $1.60 per ton of 2,000 pounds holddown in the increases on fertilizer materials, including potash. This maximum increase became effective May 6, 1948.

6.

During the period January 5, 1948, through May 5, 1948, quantities of potash were shipped by rail from Carlsbad and Loving, New Mexico, to destinations in Canada at which were located plants of the plaintiff. The shipments moved within the United States over lines of railroad operated by the defendants. At various points the shipments crossed the border into Canada. From the border points to the destinations in Canada the shipments moved over lines of railroad operated by the Canadian National Railways and by the Canadian Pacific Railway Company, neither of which is a defendant in this case. The freight charges covering transportation from origin to destination were collected by the Canadian National Railways and the Canadian Pacific Railway Company, and were distributed among those carriers and the defendants on the basis of interline settle-[fol. 30] ments. On all of these shipments defendants assessed the applicable single-factor, joint through rates from the mentioned United States origins to the described destinations in eastern Canada, plus the 20 per cent interim increase.

7

7.

Eighty-one of the shipments originated at Carlsbad, New Mexico, and were delivered to plaintiff at Toronto, Ontario, Canada.

Twenty of the shipments originated at Carlsbad, New Mexico, and were delivered to plaintiff at Welland, Ontario, Canada.

Twenty-two of the shipments originated at Carlsbad, New Mexico, and were delivered to plaintiff at Montreal, Quebec, Canada.

Seven of the shipments originated at Carlsbad, New Mexico, and were delivered to plaintiff at Saint John, New Brunswick, Canada.

One of the shipments originated at Loving, New Mexico, and was delivered to plaintiff at Saint John, New Brunswick, Canada. The freight rate applicable from Loving was and is the same as the rate from Carlsbad.

8.

Plaintiff paid and bore the rates and charges on all of said shipments.

9.

All of the shipments in question crossed the international border at Detroit or at Port Huron, Michigan. In the case of shipments to Saint John via the Canadian Pacific, the shipments re-entered the United States at Megantic, Quebec, and recrossed at Vanceboro, Maine. Defendants' tariffs also authorized routes via Buffalo, New York, to all of the destinations in question; in addition, shipments [fol. 31] destined to Saint John, New Brunswick, were permitted to cross the border at Vanceboro, Maine, and shipments to Montreal, Quebec, at Constable, New York.

10.

In 1950 and within the applicable period of limitations, plaintiff filed an informal complaint with the Commission alleging that said rates and charges were unlawful to the extent that the basic rates in effect prior to October 13, 1947, plus the 20 per cent interim increase exceeded said basic rates plus the permanent $1.60 per ton maximum hold-down authorized by the Commission.

11.

Action on the informal complaint was deferred, awaiting decisions in similar cases then pending before the

Commission involving like rates and charges, including *Consolidated Rendering Co.* v. *Atchison, T. & S. F. Ry. Co.*, 287 I. C. C. 673, 300 I. C. C. 87.

12.

On or about May 13, 1959, plaintiff was informed by the Commission that its informal complaint was not susceptible of informal handling, and plaintiff, on October 28, 1959, and within the applicable period of limitations, filed a formal complaint with the Commission alleging said rates and charges were unreasonable in violation of Section 1 of the Interstate Commerce Act and incorporating the aforesaid informal complaint by reference.

13.

In 1944 and 1946, the Commission had considered the lawfulness of potash rates from the two origins here involved to destinations in eastern United States. It found the rates [fol. 32] unreasonably high and prescribed reasonable maximum rates in No. 29202, *Potash Co. of America* v. *Aberdeen & R. R. Co.*, 264 I. C. C. 401, and *Potash Co. of America* v. *Aberdeen & R. R. Co.*, 258 I. C. C. 109.

The table which follows shows the rates to selected United States destinations from Carlsbad, New Mexico, as a typical origin, both before and after the prescription by the Commission and compares them to rates to the Canadian destination here involved.

FROM CARLSBAD, N. M.

Rates in Cents Per Ton of 2000 Lbs.

To	Miles	Rates Prior to ICC Cases	I. C. C. Reduced Rates Without X162*	I. C. C. Reduced Rates With X162	Rates for Period Jan. 5 to May 5, 1948 X166 (20%)	$1.60 Ton Max.	Sought
Welland, Ont.	1728	1100	1100	1220	1464		1380
Buffalo, N. Y.	1747	1100	1050	1170	1404	1330	
Spread	—19	-0-	+50	+50	+60	+134	+50
Toronto, Ont.	1741	1100	1100	1220	1464		1380
Buffalo, N. Y.	1747	1100	1050	1170	1404	1330	
Spread	—6	-0-	+50	+50	+60	+134	+50
Montreal, Que.	2075	1320	1320	1440	1728		1600
New York, N. Y.	2100	1280	1140	1260	1512	1420	
Spread	—25	+40	+180	+180	+216	+308	+180
Montreal, Que.	2075	1320	1320	1440	1728		1600
Boston, Mass.	2216	1380	1190	1310	1572	1470	
Spread	—141	—60	+130	+130	+156	+258	+130
Montreal, Que.	2075	1320	1320	1440	1728		1600
Portland, Me.	2288	1380	1190	1310	1572	1470	
Spread	—213	—60	+130	+130	+156	+258	+130
St. John, N. B.	2551	1580	1580	1700	2040		1860
Houlton, Me.	2539	1600	1410	1530	1836	1690	
Spread	+12	—20	+170	+170	+204	+350	+170
St. John, N. B.	2551	1580	1580	1700	2040		1860
Caribou, Me.	2589	1620	1430	1550	1860	1710	
Spread	—38	—40	+150	+150	+180	+330	+150

* X162 refers to *Ex Parte 162, Increased Railway Rates, 1946*, 266 I. C. C. 537, which authorized maximum increase on potash of $1.20 per ton.

14.

In its Docket 30578, *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 300 I. C. C. 87, [fol. 33] decided March 18, 1957, the Interstate Commerce Commission, acting under Section 1 of the Interstate Commerce Act (49 U. S. C. § 1), held, among other things, that rates on potash that were in effect between January 5 and May 5, 1948, from Carlsbad and Loving to Port Huron, Detroit, Buffalo, and Vanceboro were unreasonably high, and prescribed, retroactively, maximum reasonable rates on a lower level. A comparison of the rates in effect to these border crossings at the time these shipments moved with the rates subsequently prescribed as maximum rea-

sonable rates to those points is as follows (rates shown are on a per-ton basis):

Border Point	Rate at Time of Movement	Rate Later Prescribed as Maximum Reasonable	Difference
Port Huron	$13.32	$12.70	62¢
Detroit	13.32	12.70	62¢
Buffalo	14.04	13.30	74¢
Vanceboro	17.28	16.00	128¢

Shippers who had paid charges on shipments terminating at these border points during the period January 5 through May 5, 1948, were held to be entitled to reparation measured by the difference between the rates found unreasonably high and the rates found to be maximum reasonable rates.

15.

Plaintiff herein filed a complaint with the Interstate Commerce Commission on October 30, 1959, in Docket 33261, *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co., et al.*

The rates paid by plaintiff and the rates plaintiff contended were maximum reasonable rates are shown in the following comparisons (rates shown are on a per-ton basis):

Canadian Destination	Rate Charged	Rate Sought	Difference
Toronto, Ont.	$14.60	$13.80	80¢
Welland, Ont.	14.60	13.80	80¢
Montreal, Que.	17.20	16.00	120¢
St. John, N. B.	20.40	18.60	140¢

[fol. 34] Division 2 of the Interstate Commerce Commission issued its report May 24, 1961, in Docket 33261, *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 313 I. C. C. 759. A copy of that report is included as Exhibit B to the complaint herein. In that report the Commission found that the rates charged were unreasonable as alleged in the complaint and prescribed maximum reasonable rates,

on the basis sought by the plaintiff, retroactively for the period in which the shipments had moved.

The defendants in Docket 33261 filed a petition for reconsideration with the Interstate Commerce Commission. That petition was denied by the Commission in an order dated October 9, 1961; a copy of that order is included as Exhibit C to the complaint herein.

Following an examination by the defendants of paid freight bills submitted by the plaintiff, the defendant made certification of the accuracy of plaintiff's compilation of total transportation charges paid on these shipments. Thereafter, the Interstate Commerce Commission issued its order of August 28, 1962, a copy of which is included as Exhibit D to the complaint, and directed payment of reparation to plaintiff by the defendants herein and by the Canadian National Railways and the Canadian Pacific Railway Company, which are not defendants herein.

16.

Defendants have made payment of reparation to plaintiff in a sum less than that shown in the Interstate Commerce Commission's order of August 28, 1962. The difference, excluding interest, is $1,390.55. The principal of the amount paid by defendants was measured by the difference between the rates charged on these shipments up to the international boundary points and the rates to those border points that were prescribed as maximum reasonable rates by the Inter- [fol. 35] state Commerce Commission in the *Consolidated Rendering* case, *supra*. Stated otherwise, the defendants declined to make payment of reparation on that portion of the freight charges that was paid for transportation within Canada.

Canada Packers, Limited, Plaintiff, By: Charles B. Myers, Its Attorney.

The Atchison, Topeka and Santa Fe Railway Company, et al., Defendants, By: Harvey Huston, Their Attorney.

Dated at Chicago, Illinois, this 15th day of January, 1964.

IN THE UNITED STATES DISTRICT COURT

AMENDMENT TO STIPULATION OF FACTS—
Filed January 30, 1964

It is hereby agreed by plaintiff and defendants that Paragraph 16 of the Stipulation of Facts filed herein on January 15, 1964, is inaccurate in certain respects and that the following paragraph be substituted therefor.

16.

Defendants have made payment of reparation to plaintiff in a sum less than the total of the amounts pertaining to the shipments involved herein, as listed in the Interstate Commerce Commission's order of August 28, 1962. The total of those amounts, excluding interest, is $6,694.56. Defendants made payment to plaintiff in the sum of $5,304.01, plus interest. The difference, excluding interest, is $1,390.55. The sum, excluding interest, that was paid by [fol. 36] defendants, was measured by the difference between the total of the amounts pertaining to these shipments as listed in the order of August 28, 1962, and a portion thereof representing the share retained by the Canadian railroads for that part of the transportation that took place beyond the international boundary. Stated otherwise, defendants declined to make payment of reparation on that portion of the freight charges that was paid for transportation within Canada.

Canada Packers, Limited, Plaintiff, By: Charles B. Myers, Its Attorney.

The Atchison, Topeka and Santa Fe Railway Company, et al., Defendants, By: Harvey Huston, Their Attorney.

Dated at Chicago, Illinois, this 30th day of January, 1964.

IN THE UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW
—Entered March 20, 1964

This cause, having been submitted to the Court on a Stipulation of Facts by the parties hereto and the Court having fully considered such Stipulation and the arguments of counsel as set forth in their respective briefs, now makes the following findings, conclusions and order herein:

FINDINGS OF FACT

The parties are in agreement as to the facts involved in this proceeding, and the Court hereby adopts their Stipulation of Facts, as amended, as its findings of fact in this cause.

[fol. 37] CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and the parties under the provisions of Section 16(2) of the Interstate Commerce Act, 49 U. S. C. 16(2).
2. The Interstate Commerce Act and the jurisdiction of the Commission extend to transportation from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States, 49 U. S. C. 1(1)(2).
3. All charges for transportation must be just and reasonable, and every unjust and unreasonable charge is prohibited and declared to be unlawful, 49 U. S. C. 1(5).
4. The rates and charges applicable and assessed on the transportation in question were the joint through international rates.
5. The defendants' failure to establish lawful rates applicable to the transportation performed by them within the United States violated the Act, and plaintiff was compelled to pay the joint through international rates.

6. The Commission had jurisdiction to determine whether plaintiff was damaged as a result of defendants' violation of the Act.

7. The findings of fact and conclusions of law stated in the report and order of the Interstate Commerce Commission, holding the joint through international rates unjust and unreasonable and awarding damages to plaintiff, are supported by substantial evidence and are not arbitrary, capricious or otherwise unlawful.

8. The assessment and collection of an unjust and unreasonable charge is a tort for which the defendants are jointly and severally liable.

[fol. 38]

9. The defendants are jointly and severally liable for the damage incurred by plaintiff without regard to the proportion of charges attributable to the transportation in the foreign country and without regard to the portion paid the foreign carrier.

ORDER FOR JUDGMENT

Wherefore, in accordance with the foregoing findings of fact and conclusions of law, judgment is ordered for plaintiff and jointly and severally against each of the named defendants in the sum of $1,390.55, plus interest at the rate of 4 per cent per annum from the date of payment of the freight charges on the aforesaid shipments, to the date of this order, which interest amounts to $884.75. It is further ordered that plaintiff is entitled to a reasonable attorney's fee in the amount of $750.00, and that defendants pay the costs of the action.

Enter:

Hubert L. Will, District Judge.

Dated: March 20, 1964.

[fol. 39]

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 17, 1964

To: Charles B. Myers, 611 Field Building, Chicago 3, Illinois.

Notice is hereby given that The Atchison, Topeka and Santa Fe Railway Company, and all of the other defendants in this action above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from:

1. The judgment ordered and entered on March 20, 1964, jointly and severally against all of the named defendants in the sum of $1,390.55 plus interest at the rate of 4% per annum from the date of payment of the freight charges on the shipments to the date of the order which interest amounts to $884.75.

2. The order entered on March 20, 1964, granting plaintiff's attorneys' fees of $750.00 plus costs of the action.

3. The conclusions of law entered on March 20, 1964.

Floyd Stuppi, Harvey Huston, Gus Svolos, 80 East Jackson Boulevard, Chicago 4, Illinois, HA. 7-4900, Attorneys for Defendants-Appellants.

Dated: April 17, 1964.

[fol. 40]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14659 September Term, 1964—January Session, 1965

CANADA PACKERS, LIMITED, a Canadian corporation,
Plaintiff-Appellee,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION—March 2, 1965

Before Hastings, Chief Judge, and Duffy and Schnackenberg, Circuit Judges.

Schnackenberg, Circuit Judge. Defendants, The Atchison, Topeka and Santa Fe Railway Company and several other railroads[1] appeal (1) from a judgment of the district court for $1390.55 and interest thereon, and (2) an order granting plaintiff attorneys' fees, plus costs of the action. [fol. 41] Plaintiff in its complaint sought enforcement of an order of the Interstate Commerce Commission, pursuant

[1] The Chesapeake and Ohio Railway Company, Chicago South Shore and South Bend Railroad, Detroit, Toledo and Ironton Railroad Company, Elgin, Joliet and Eastern Railway Company, Grand Trunk Western Railroad Company, New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Wabash Railroad Company.

to the Interstate Commerce Act, 49 U.S.C.A. § 1, *et seq.*, against defendants as common carriers.

The complaint alleges that defendants transported carload shipments of potash from Carlsbad and Loving, New Mexico, to plaintiff at the following points in Canada: Toronto, West Toronto and Welland, Ontario, Montreal, Quebec, and St. John, New Brunswick, and demanded and collected from plaintiff charges which were unjust and unreasonable, in violation of section 1 of said act.

The complaint also alleges that, pursuant to proceedings before it, the Commission on August 28, 1962 entered an order which found that plaintiff herein is entitled to reparation from defendants *"insofar as the transportation took place over their lines in the United States"* [2] and directed defendants and their Canadian connecting carriers to pay plaintiff reparations totaling $6,694.56 plus interest, upon which defendants have paid all that is due except the sum for which suit was here brought.

Defendants contend that they have complied with the terms of the Interstate Commerce Commission's reparation order and no additional amounts are owing to plaintiff. They emphasize that the reparation order of August 28, 1962 was expressly restricted to an award for transportation over lines in the United States. They assert that the amounts listed in the order represent the difference between (a) the total charges paid for the entire transportation service from the New Mexico origins to the Canadian destinations ($14.60 per ton to Toronto and Welland, Ontario, $17.20 to Montreal, Quebec, and $20.40 to Saint John, New Brunswick) and (b) the total charges recomputed retroactively on the basis of maximum rates that are 80¢ per ton lower to Toronto and Welland than those charged ($13.80 in lieu of $14.60), 120¢ lower to Montreal ($16.00 in lieu of $17.20), and 140¢ [3] lower to Saint John ($18.60 in lieu of $20.40).

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[2] Italics supplied for emphasis.

[3] This figure of 140¢ was stipulated in this case. It probably should have been 180¢.

They argue that the amounts listed in the Commission's order would require refunds of charges paid for trans- [fol. 42] portation performed by Canadian railroads within Canada as well as on transportation performed within the United States.

1. At the time the shipments in question moved in this case, defendants maintained certain freight rates on potash from Carlsbad and Loving, New Mexico, to the United States border points where these shipments crossed into Canada. In a decision issued March 18, 1957, *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Ry. Co., et al.*, 300 I. C. C. 87, the Commission held that the freight rates on potash that had been in effect between January 5, 1948 and May 5, 1948 from Carlsbad and Loving, New Mexico, to Detroit and Port Huron, Michigan, and Vanceboro, Maine, were unreasonably high, and prescribed, retroactively, maximum reasonable rates on a lower level. A comparison of the rates in effect to these border crossings, at the time plaintiff's shipments moved, with the rates subsequently prescribed (in the *Consolidated Rendering* case) as maximum reasonable rates to those points, is as follows (rates shown are on a per-ton basis):

Border Point	Rates At Time of Movement	Rates Later Prescribed As Maximum Reasonable	Difference
Detroit	$13.32	$12.70	62¢
Port Huron	13.32	12.70	62¢
Vanceboro	17.28	16.00	128¢

In the present proceeding, the Commission in 1962 held that the rates charged on the international shipments from Carlsbad and Loving to Toronto, Welland, Montreal and Saint John were unreasonable, and prescribed, retroactively, still lower rates as maximum reasonable rates, and ordered that plaintiff was entitled to reparation in the amount of the difference between the charges collected

and those that would have accrued at the rates found to be reasonable, and thereby made the computations upon which the order of August 28, 1962 was based. While that order purports to limit its effect to transportation over lines in the United States, it is obvious that the computations upon which it is based were not so restricted. [fol. 43] Plaintiff seeks support for the Commission's order in *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U.S. 179. However, in that case, where there was a through rate from a point in Canada to New York City within the United States, the court pointed out, at 186-7, that it was the duty of the railroad to establish a rate from the international boundary to New York City, in the absence of which the shipper had been compelled to pay the through charges. The court sustained the jurisdiction of the Commission to determine the reasonableness of the charges exacted, *i. e.*, the through rate. In the case at bar, rates from New Mexico to the border points were in effect and hence this case is not governed by *News Syndicate*.

Plaintiff also relies on *Lewis, etc. Co.* v. *Southern Pac. Co.*, 283 U.S. 654. However, that case was controlled by *News Syndicate*, as the court expressly stated, at 663. The defendant in *Lewis* is an interstate carrier by railroad and its lines connect at the international boundary at Nogales, Arizona with the line of a Mexican common carrier by railway extending from Navojoa, Sonora. Three carloads of cowpeas were shipped from Navojoa to San Francisco, California, on through bills of lading issued by the foreign line and the rate charged was that stated in a joint tariff filed by the carriers with the Commission and its counterpart in Mexico. A complaint seeking reparations before the Commission alleged that the joint through rate was unreasonable. Defendant moved to dismiss the complaint on the ground that the Commission lacked jurisdiction over rates from points in a foreign country to points in the United States. However, the court pointed out that the tariff did not purport to apply to the American part of such international transportation which

"must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier". The court, at 663, commented upon the failure of defendant carrier to bring forward evidence that a rate on its own line to the international border "had been established as required by the Act."

In the case at bar, defendants met the burden of proving the rates from Carlsbad and Loving, New Mexico to the Canadian border points. We are therefore required to conclude that the latter rates must be considered as a [fol. 44] maximum guide in awarding damages to plaintiff. To conclude otherwise would mean that the defendant railroads would be required to pay reparation to a Canadian consignee on account of freight charges received for transportation performed within Canada by Canadian railroads which are not parties to this action. Such a result clearly is prohibited by the territorial limitation provisions of section 1 of the Interstate Commerce Act. 49 U.S.C.A. §§ 1, *et seq.*

For the reasons herein stated, the judgment and the order from which defendants have appealed are reversed.

Judgment and Order Reversed.

A true Copy:

Teste:

....., Clerk of the United States Court of Appeals for the Seventh Circuit.

[fol. 45]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14659

CANADA PACKERS, LIMITED, a Canadian corporation,
Plaintiff-Appellee,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
et al., Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT—March 2, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and the order of the said District Court in this cause appealed from be, and the same are hereby, Reversed, with costs, in accordance with the opinion of this Court filed this day.

[fol. 46]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING
—April 16, 1965

It Is Ordered by the Court that the petition for a rehearing of this cause, filed by appellee, be, and the same is hereby Denied.

[fol. 47] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 48]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—February 21, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

No. ~~346~~ 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CANADA PACKERS, LIMITED,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY, ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, WABASH RAILROAD COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES B. MYERS,
611 Field Building
Chicago, Illinois 60603
Attorney for Petitioner

July 1965

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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STATUTE:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

CANADA PACKERS, LIMITED,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY, ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, WABASH RAILROAD COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Canada Packers, Limited, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Interstate Commerce Commission, Division 2, dated May 24, 1961, is reproduced in Appendix of Defendants-Appellants,[1] pages 13-21, and is reported at 313 I.C.C. 759. The findings of fact and conclusions of law of the United States District Court for the Northern District of Illinois, Eastern Division, entered March 20, 1964 (App. Dfts., pp. 36-38) are not reported.

The opinion of the Court of Appeals, entered March 2, 1965 (Appendix A, *infra*, pp. App. 1-App. 6) is reported at 342 F. 2d 563.

JURISDICTION

The judgment of the District Court was entered March 20, 1964 (App. Dfts., p. 38). The judgment of the Court of Appeals, reversing the District Court, was entered March 2, 1965 (Appendix A, *infra*, p. App. 7). A petition for rehearing, timely filed on March 17, 1965, was denied on April 16, 1965. (Appendix A, *infra*, p. App. 8)

The jurisdiction of this Court is invoked under 28 U. S. Code § 1254(1).

QUESTION PRESENTED

Where American railroads joined with Canadian railroads in joint through international rates which applied to and were charged on shipments from origins in the United States to destinations in Canada and such joint rates were found by the Interstate Commerce Commission to be in excess of maximum reasonable rates, did the Commission exceed its jurisdiction in awarding reparation in the full amount of the excess charges, including the proportion of the charges attributable to transportation in Canada?

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[1] For brevity, the Appendix of Defendants-Appellants is hereinafter referred to as App. Dfts.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act here involved are Sections 1, 6, 8, 15 and 16, 49 U. S. Code §§ 1, 6, 8, 15 and 16, and are reproduced in Appendix B hereto, pp. App. 9 - App. 13.

STATEMENT

Proceedings before the Commission

In 1950, petitioner filed an informal complaint with the Commission alleging that the joint through international rates charged by the American railroad respondents and their connecting Canadian carriers for the through transportation of shipments of potash from Carlsbad and Loving, New Mexico,[2] to Toronto, West Toronto and Welland, Ontario; Montreal, Quebec; and St. John, New Brunswick, Canada, during the period January 5, 1948, through May 5, 1948, were unjust and unreasonable, and reparation was sought. All of the shipments in question crossed the international border at Detroit or at Port Huron, Michigan.

Action on the informal complaint was deferred, awaiting decisions in similar cases then pending before the Commission, including *Consolidated Rendering Co.* v. *Atchison, T. & S. F. Ry. Co.*, 287 I.C.C. 673, 300 I.C.C. 87, involving the question of whether existing basic rates (on a number of commodities, including potash) as increased by certain interim or temporary percentage increases in effect from January 5 through May 5, 1948, were unreasonable to the extent they exceeded basic rates plus lower permanent in-

[2] The complaint before the Commission also involved shipments from Trona, California. Full reparation has been received on these shipments, and they are not in issue.

creases prescribed by the Commission. (App. Dfts., pp. 29-31) On March 18, 1957, the Commission handed down its decision in *Consolidated Rendering, supra,* holding that, during the period in question, rates on potash (plus the temporary increases) from Carlsbad and Loving, New Mexico, to Port Huron and Detroit, Michigan, were unreasonable to the extent they exceeded the basic rates plus the permanent increases found by the Commission to be reasonable. (App. Dfts., pp. 31-33) When the railroads refused to satisfy petitioner's informal complaint on the same relative basis, petitioner timely filed a formal complaint. On March 24, 1961, the Commission, Division 2, in *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.,* 313 I.C.C. 759, held that the joint through international rates assessed on petitioner's shipments during the period in question, were unjust and unreasonable and that petitioner was entitled to reparation on the entire transportation in the amount of the difference between the charges collected and those which would have accrued at the lower rates found by the Commission to be just and reasonable. The Commission rejected respondents' argument that the amount of reparation could not exceed the award made in *Consolidated Rendering* to Port Huron and Detroit, the border points at which petitioner's shipments crossed into Canada. A petition for reconsideration was denied on October 9, 1961. (App. Dfts., pp. 13, 19-21)

By order dated August 28, 1962, the Commission directed the respondents and certain Canadian railroads to pay petitioner specific amounts of reparation, with interest, "insofar as the transportation took place over their lines in the United States." (App. Dfts., pp. 22-25) Respondents refused to pay reparation in the amount awarded but paid to petitioner an amount computed as if petition-

er's shipments had terminated at Detroit and Port Huron.[3] (App. Dfts., pp. 35-36)

Proceedings in Federal Courts

Petitioner filed suit in the District Court[4] under Section 16(2) of the Interstate Commerce Act, 49 U.S. Code § 16 (2), claiming the difference between the amount paid by respondents and the amount set forth in the Commission's order. The District Court concluded that the joint through rates were the applicable rates, that respondents' failure to establish lawful rates applicable to the border points violated the Act, and that the assessment and collection of the unreasonable charge was a tort for which the respondents were jointly and severally liable without regard to the proportion of charges attributable to the transportation in the foreign country. Judgment was entered for petitioner. (App. Dfts., pp. 37-38)

The Court of Appeals reversed that judgment concluding that the respondents had met the burden of proving rates from Carlsbad and Loving, New Mexico, to the border points, that those rates must be considered as a maximum guide in awarding damages to petitioner, and that any other conclusion would mean that the respondent railroads would be required to pay reparation to a Canadian consignee on account of freight charges received for transportation performed within Canada by Canadian railroads not parties to the case. It found such a result prohibited by the territorial limitation provisions of Section 1 of the Interstate Commerce Act. (Appendix A, pp. App. 5-App. 6)

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[3] The Commission ordered payment of $6,694.56, plus interest, on the shipments in question. Respondents paid $5,304.01, plus interest, leaving an unpaid balance of $1,390.55, excluding interest. (App. Dfts., pp. 35-36)

[4] The American railroads were the only ones sued.

REASONS FOR GRANTING THE WRIT.

I.

The decision of the Court of Appeals is directly in conflict with this Court's decisions in *Lewis-Simas-Jones Co.* v. *Southern R. Co.*, 283 U.S. 654 (1931), and *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179 (1927).

The lower court's discussion of *Lewis* and *News Syndicate* and its conclusion that those cases are not governing here very plainly show that it misconstrued what this Court said in those two decisions in upholding awards of full reparation based on excessive joint through international rates.

In *Lewis*, the defendant was an American railroad which had joined with a Mexican railroad in a joint through international rate on cow peas from Navojoa, Sonoro, Mexico, to San Francisco, California. The shipments moved through the border point of Nogales, Arizona. Upon complaint, the Interstate Commerce Commission found the joint rate unreasonable and ordered the American carrier to pay the full amount of reparation, including that portion representing charges attributable to transportation in Mexico. The railroad refused to make payment, and the shipper brought suit in a state court to enforce the award.

The trial court found that the railroad also maintained a rate from Nogales to San Francisco on this same commodity which was lower than the joint through rate, that the Commission had made no finding respecting the lawfulness of this lower rate and that it was reasonable and lawful for application on shipments from the border point to San Francisco. It dismissed the shipper's suit on the ground that the Commission's order was void for lack of jurisdiction. (283 U.S. 654, 656, 657)

On appeal, the district court of appeal affirmed, stating that unlike *News Syndicate*, the railroad in the instant case had maintained a rate from the boundary to destination and that the shipper had not been compelled to pay the joint through rate by reason of any violation of the Act on the part of the defendant.

This Court reversed, holding that the lower court erred in distinguishing the case from *News Syndicate* and that *News Syndicate* was controlling. (283 U.S. 654, 659, 663) In passing on the lower court's conclusion regarding the applicability of the rate from the border point to destination, this Court said (page 663 of 283 U.S.) "The trial court's findings are not sufficient to show that *at the time* the shipments in question moved defendant maintained a *just and reasonable* rate *applicable* to the transportation of such shipment over its lines from the international boundary to destination. The tariff, as described in the findings, does not purport to *apply* to the American part of such international transportation." (Emphasis supplied)

The Court of Appeals in the case at bar committed the same error as the lower court in *Lewis* by failing to recognize the distinction between the mere existence of a rate between the named American points and a rate which *at the time* the shipment moved was *just* and *reasonable* and which *applied* (to the exclusion of every other rate[5]) on the American portion of the international transportation. At no time in the course of this proceeding, either at the Commission level or before the lower courts, have the respondents contended or presented evidence that the rates from

[5] There can be only one applicable (legal) rate on a given shipment. *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234.

Carlsbad and Loving to Detroit and Port Huron, in effect *at the time* the shipments in question moved were the *just and reasonable* rates *applicable* to the American part of the international transportation. The railroads obviously could not contend these rates were lawful because the Commission had already decided in *Consolidated Rendering, supra,* that during the time the traffic moved *these rates were unjust* and *unreasonable:* Thus, the respondents have failed to, indeed could not, make the showing required in the *Lewis* case. And as this Court said at page 663 of that case, the burden was upon the carrier to bring forward evidence that a rate for the American part of the through international transportation had been established as required by the act. Respondents did not and could not carry that burden because the rates to Detroit and Port Huron were never—at any time—applicable to the American portion of this international transportation. The only rates which did apply on petitioner's shipments were the excessive joint through international rates.

The finding by the court below that defendants met their burden of proving rates from Carlsbad and Loving to the Canadian border points is patently erroneous and should be reversed.

II.

The Court of Appeals was of the opinion that requiring the American railroad respondents to pay reparation on account of freight charges received for transportation performed within Canada was a result prohibited by the territorial limitation provisions of Section 1 of the Act.

The lower court is wrong on this critical point also for *Lewis* and *News Syndicate* make it abundantly clear that the Interstate Commerce Act applies to international commerce to the extent the transportation takes place within

the United States, that the railroads are required to establish just and reasonable rates between the international boundary and the American origin or destination, as the case may be, and if they fail to establish such rates they are liable to shippers for any damages resulting therefrom. §§ 1 (1) (c), (2) and (5), 6 (1), (7), and 8. (283 U. S. 654, 660; 275 U.S. 179, 186, 187) The demand for reparation is based on such failure and it claims damages suffered by the shipper as a result of being compelled to pay the excessive joint international rate maintained by the American railroad. Under section 16(1) the Commission has jurisdiction and the duty to determine the reasonableness of the joint through international rate in ascertaining the shipper's damages. (283 U. S. 654, 659-662)

The crux of this Court's decisions approving full reparation, without any reduction for that portion of the freight charges representing foreign transportation, is clearly stated, at page 660 of the *Lewis* case:

> The collection by a common carrier of exorbitant charges is a tort (Smith v. Chicago & N. W. R. Co. 49 Wis. 443, 448, 5 N. W. 240) and the general rule as to liability of joint tort-feasors applies where two or more connecting carriers combine to impose excessive charges for transportation over their connecting lines. *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.* 269 U.S. 217, 232, 233, 70 L. ed. 242, 249, 250, 46 S. Ct. 73. Defendant is liable for any violation of the Act by it that caused or contributed to cause damage to plaintiff without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier. *News Syndicate Co.* v. *New York C. R. Co. supra* (275 U. S. 187, 188, 72 L. ed. 228, 229, 48 S. Ct. 39).

The opinion below does not intimate, and certainly does not expressly state, why the so-called territorial limitations of Section 1 did not prevent the awarding of full reparation

in *Lewis* and *News Syndicate*. It seems to logically follow that, if the Commission's jurisdiction is so limited in this proceeding, it also lacked that power in the two situations involved in these earlier decisions of this Court. The Court of Appeals takes no note of this obvious contradiction between its opinion and the decisions of this Court.

III.

If the decision below is not reversed, it will overrule Commission precedents dating at least as far back as 1922, *International Nickel Co.* v. *Director General*, 66 I.C.C. 627, where the Commission found joint international rates from Canadian origins to destinations in New Jersey to be unreasonable and awarded reparation for the full amount of damages sustained by the shipper. Aside from this disruption in the uniform administration and interpretation of Section 16 and other pertinent sections, the decision, if permitted to stand, will render ineffectual the Commission's power to grant reparation on joint through international rates. If the opinion below is validated, American railroads will be able to join with foreign lines in publishing and assessing joint through international rates which are outrageously high in relation to the service performed, so long as they also maintain a reasonable rate between the border points and origins or destinations in the United States; the fact that such lower rate will not be applicable to the American portion of the through international transportation will be immaterial. The Commission will have no power to award reparation to a shipper for the inordinately excessive international rate. Thus, there would be an injury for which there is no remedy.

If petitioner is correct in its assertion that the lower court's decision could deprive the Commission of its jurisdiction then petitioner respectfully suggests that the Court may wish to invite the Interstate Commerce Commission

to give its views as *amicus curiae* on the subject before ruling on this petition.

IV.

If the lower court was correct in distinguishing the instant case from *Lewis* and *News Syndicate*, then its "maximum guide" test, which so far as petitioner can determine is wholly without precedent, would come into play and would make this a case of first impression. In that event, the Commission and the shippers and carriers of the United States and adjoining foreign countries would seem entitled to have this Court pass upon that novel theory and the radical effects it might have on a matter of such great and continuing importance. The views of the Commission might be especially helpful in the premises.

CONCLUSION.

The opinion of the Court of Appeals is so patently in conflict with this Court's decisions in *Lewis* and *News Syndicate* as to make this an appropriate case for summary reversal. That opinion would result in rendering the Commission virtually powerless in its future administrative handling of reparation claims on international shipments and would leave injured shippers without a remedy.

If the lower court is correct in distinguishing this case from *News Syndicate* and *Lewis*, then the Supreme Court should pass on that decision as one of first impression and give the shipping public and transportation industry the benefit of final decision thereon.

Respectfully submitted,

Charles B. Myers

CHARLES B. MYERS
Attorney for Canada Packers, Ltd., Petitioner
611 Field Building
Chicago, Illinois 60603

July, 1965

APPENDIX

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

No. 14659 SEPTEMBER TERM, 1964 — JANUARY SESSION, 1965

CANADA PACKERS, LIMITED, a Canadian corporation,
Plaintiff-Appellee,

-vs.-

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 2, 1965

Before HASTINGS, *Chief Judge,* and DUFFY and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge*—Defendants, The Atchison, Topeka and Santa Fe Railway Company and several other railroads[1] appeal (1) from a judgment of the district

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[1] The Chesapeake and Ohio Railway Company, Chicago South Shore and South Bend Railroad, Detroit, Toledo and Ironton Railroad Company, Elgin, Joliet and Eastern Railway Company, Grand Trunk Western Railroad Company, New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Wabash Railroad Company.

court for $1,390.55 and interest thereon, and (2) an order granting plaintiff attorneys' fees, plus costs of the action.

Plaintiff in its complaint sought enforcement of an order of the Interstate Commerce Commission, pursuant to the Interstate Commerce Act, 49 U.S.C.A. § 1, *et seq.*, against defendants as common carriers.

The complaint alleges that defendants transported carload shipments of potash from Carlsbad and Loving, New Mexico, to plaintiff at the following points in Canada: Toronto, West Toronto and Welland, Ontario, Montreal, Quebec, and St. John, New Brunswick, and demanded and collected from plaintiff charges which were unjust and unreasonable, in violation of section 1 of said act.

The complaint also alleges that, pursuant to proceedings before it, the Commission on August 28, 1962 entered an order which found that plaintiff herein is entitled to reparation from defendants "*insofar as the transportation took place over their lines in the United States*"[2] and directed defendants and their Canadian connecting carriers to pay plaintiff reparations totaling $6,694.56 plus interest, upon which defendants have paid all that is due except the sum for which suit was here brought.

Defendants contend that they have complied with the terms of the Interstate Commerce Commission's reparation order and no additional amounts are owing to plaintiff. They emphasize that the reparation order of August 28, 1962 was expressly restricted to an award for transportation over lines in the United States. They assert that the amounts listed in the order represent the difference between (a) the total charges paid for the entire transportation service from the New Mexico origins to the

[2] Italics supplied for emphasis.

Canadian destinations ($14.60 per ton to Toronto and Welland, Ontario, $17.20 to Montreal, Quebec, and $20.40 to Saint John, New Brunswick) and (b) the total charges recomputed retroactively on the basis of maximum rates that are 80¢ per ton lower to Toronto and Welland than those charged ($13.80 in lieu of $14.60), 120¢ lower to Montreal ($16.00 in lieu of $17.20), and 140¢[3] lower to Saint John ($18.60 in lieu of $20.40).

They argue that the amounts listed in the Commission's order would require refunds of charges paid for transportation performed by Canadian railroads within Canada as well as on transportation performed within the United States.

1. At the time the shipments in question moved in this case, defendants maintained certain freight rates on potash from Carlsbad and Loving, New Mexico, to the United States border points where these shipments crossed into Canada. In a decision issued March 18, 1957, *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Ry. Co., et al.*, 300 I.C.C. 87, the Commission held that the freight rates on potash that had been in effect between January 5, 1948 and May 5, 1948 from Carlsbad and Loving, New Mexico, to Detroit and Port Huron, Michigan, and Vanceboro, Maine, were unreasonably high, and prescribed, retroactively, maximum reasonable rates on a lower level. A comparison of the rates in effect to these border crossings, at the time plaintiff's shipments moved, with the rates subsequently prescribed (in the *Consolidated Rendering*

[3] This figure of 140¢ was stipulated in this case. It probably should have been 180¢.

case) as maximum reasonable rates to those points, is as follows (rates shown are on a per-ton basis):

Border Point	Rates at Time of Movement	Rates Later Prescribed as Maximum Reasonable	Difference
Detroit	$13.32	$12.70	62¢
Port Huron	13.32	12.70	62¢
Vanceboro	17.28	16.00	128¢

In the present proceeding, the Commission in 1962 held that the rates charged on the international shipments from Carlsbad and Loving to Toronto, Welland, Montreal and Saint John were unreasonable, and prescribed, retroactively, still lower rates as maximum reasonable rates, and ordered that plaintiff was entitled to reparation in the amount of the difference between the charges collected and those that would have accrued at the rates found to be reasonable, and thereby made the computations upon which the order of August 28, 1962 was based. While that order purports to limit its effect to transportation over lines in the United States, it is obvious that the computations upon which it is based were not so restricted.

Plaintiff seeks support for the Commission's order in *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U.S. 179. However, in that case, where there was a through rate from a point in Canada to New York City within the United States, the court pointed out, at 186-7, that it was the duty of the railroad to establish a rate from the international boundary to New York City, in the absence of which the shipper had been compelled to pay the through charges. The court sustained the jurisdiction of the Commission to determine the reasonableness of the charges exacted, *i.e.*, the through rate. In the case at bar, rates from New Mexico to the border points were in effect, and hence this case is not governed by *News Syndicate*.

Plaintiff also relies on *Lewis, etc. Co.* v. *Southern Pac. Co.*, 283 U.S. 654. However, that case was controlled by *News Syndicate*, as the court expressly stated, at 663. The defendant in *Lewis* is an interstate carrier by railroad and its lines connect at the international boundary at Nogales, Arizona with the line of a Mexican common carrier by railway extending from Navojoa, Sonora. Three carloads of cowpeas were shipped from Navojoa to San Francisco, California, on through bills of lading issued by the foreign line and the rate charged was that stated in a joint tariff filed by the carriers with the Commission and its counterpart in Mexico. A complaint seeking reparations before the Commission alleged that the joint through rate was unreasonable. Defendant moved to dismiss the complaint on the ground that the Commission lacked jurisdiction over rates from points in a foreign country to points in the United States. However, the court pointed out that the tariff did not purport to apply to the American part of such international transportation which "must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier". The court, at 663, commented upon the failure of defendant carrier to bring forward evidence that a rate on its own line to the international border "had been established as required by the Act."

In the case at bar, defendants met the burden of proving the rates from Carlsbad and Loving, New Mexico to the Canadian border points. We are therefore required to conclude that the latter rates must be considered as a maximum guide in awarding damages to plaintiff. To conclude otherwise would mean that the defendant rail-

roads would be required to pay reparation to a Canadian consignee on account of freight charges received for transportation performed within Canada by Canadian railroads which are not parties to this action. Such a result clearly is prohibited by the territorial limitation provisions of section 1 of the Interstate Commerce Act. 49 U.S.C.A. §§ 1, *et seq.*

For the reasons herein stated, the judgment and the order from which defendants have appealed are reversed.

JUDGMENT AND ORDER REVERSED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the United States Court of Appeals
For the Seventh Circuit

Tuesday, March 2, 1965

BEFORE

HON. JOHN S. HASTINGS, *Chief Judge*
HON. F. RYAN DUFFY, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

CANADA PACKERS, LIMITED, a Canadian corporation,
Plaintiff-Appellee,

No. 14659 -vs.-

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and the order of the said District Court in this cause appealed from be, and the same are hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this day.

In the

United States Court of Appeals

For the Seventh Circuit

Friday, April 16, 1965

BEFORE

Hon. John S. Hastings, *Chief Judge*
Hon. F. Ryan Duffy, *Circuit Judge*
Hon. Elmer J. Schnackenberg, *Circuit Judge*

Canada Packers, Limited,
Plaintiff-Appellee,

No. 14659 -vs.-

The Atchison, Topeka and Santa Fe Railway Company, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause, filed by appellee, be, and the same is hereby DENIED.

APPENDIX "B"

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT
(49 U. S. Code § 1, et seq.)

SECTION 1 (49 U. S. Code § 1) —

(1) That the provisions of this part shall apply to common carriers engaged in —

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

* * * *

— from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, but shall not apply —

* * * *

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SECTION 6 (49 U. S. Code § 6) —

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. . . .

. . . . .

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

. . . . .

SECTION 8 (49 U. S. Code § 8) —

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

• • • •

SECTION 15 (49 U. S. Code § 15) —

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint

rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * *

SECTION 16 (49 U. S. Code § 16) —

(1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the

parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other Civil suits for damages, except that on the trial of such suit the fifidings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 346 //

CANADA PACKERS, LIMITED,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

HARVEY HUSTON,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Respondents.

FLOYD STUPPI,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Of Counsel for Respondents.

THE CONSOLIDATED PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 346.

CANADA PACKERS, LIMITED,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,[1]

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The report of the Interstate Commerce Commission, entered May 24, 1961, is reported at 313 I. C. C. 759, and is reproduced in Appendix of Defendants-Appellants,[2] pages

1. The Atchison, Topeka and Santa Fe Railway Company; The Chesapeake and Ohio Railway Company; Chicago, South Shore and South Bend Railroad; Detroit, Toledo and Ironton Railroad Company; Elgin, Joliet and Eastern Railway Company; Grand Trunk Western Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Wabash Railroad Company.

2. For brevity, the Appendix of Defendants-Appellants is hereinafter referred to as App. Dfts.

13-21. The order of the Interstate Commerce Commission entered August 28, 1962 (App. Dfts. pp. 22-25) is not reported.

The findings of fact and the conclusions of law of the United States District Court for the Northern District of Illinois, Eastern Division, entered March 20, 1964 (App. Dfts. pp. 36-38) are not reported.

The opinion of the Court of Appeals, entered March 2, 1965 (App. A of Petition) is reported at 342 F. (2d) 563.

JURISDICTION.

The jurisdictional requisites are set forth adequately in the Petition.

QUESTION PRESENTED.

The question presented, as framed by petitioner, does not describe the issue involved with sufficient precision. It is submitted that the question presented can be described more accurately as follows:

Where the Interstate Commerce Commission found that charges assessed for railroad transportation of shipments from origins in the United States to destinations in Canada were in excess of maximum reasonableness, and where the Commission also had made findings of maximum reasonableness of rates from the same origins to the border crossings through which the international shipments passed en route to Canada, did the Commission exceed its territorial jurisdiction in failing to observe the maximum reasonable rates to the border crossings as a maximum guide in awarding damages with respect to charges assessed on the international shipments?

STATUTES INVOLVED.

The pertinent provisions of the Interstate Commerce Act are set forth in the Petition (App. pp. 9-13).

STATEMENT.

The discussion in the Petition of the proceedings before the Interstate Commerce Commission and in the District Court is adequate. However, respondents consider it necessary to present a more comprehensive discussion of the proceedings in the Court of Appeals.

Two issues were before the Court of Appeals. The first issue was whether or not respondents had complied with the Interstate Commerce Commission's order of August 28, 1962, directing that reparation be paid by respondents to petitioner with respect to charges paid for transportation performed for petitioner in 1948. That order (App. Dfts. pp. 22-25) specified that petitioner, Canada Packers, was entitled to reparation from the respondents "insofar as the transportation took place over their lines in the United States," and specified particular amounts of damages in dollars and cents, subject to the qualification "insofar as the transportation took place in the United States." However, in computing the specific sums awarded, the Commission failed to restrict those amounts to charges paid for that part of the transportation that took place in the United States. Respondents, by refusing to pay reparation in the total sums listed and instead paying to petitioner an amount computed by deducting the portion attributable to transportation performed in Canada, contended that they had in fact complied with the terms of the Commission's order in the light of the specific territorial limitations included within the order.

This first issue, as described above, was considered by the Court of Appeals (App. A of Petition, pp. 2-3), but the Court did not resolve that issue.

The second issue, which was in fact resolved by the Court of Appeals, was whether, even if the respondents' interpretation of the language of the reparation order is not correct, such an order is beyond the territorial jurisdiction of the Commission. In reversing the judgment of the District Court, the Court of Appeals held that since respondents had demonstrated, by reference to the Commission's own prescription, maximum reasonable rates from the origins in New Mexico to the border points through which the international shipments moved, those rates must be considered as a maximum guide in awarding damages to petitioner. A contrary conclusion, the Court held, would require respondents to pay reparation on account of freight charges paid for that part of the transportation that was performed in Canada by Canadian railroads, a result prohibited by the territorial limitation provisions of Section 1 of the Interstate Commerce Act (App. A of Petition, pp. 3-6).

ARGUMENT.

The issue in the present case is narrow, and does not warrant review by this Court on certiorari. Petitioner suggests the possibility that this is a case of first impression (Petition p. 11). Respondents believe the particular issue has not been considered heretofore in the courts, even though the determinative territorial limitation provisions of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)) have been in effect since 1920.[3]

Petitioner asserts that the decision below is in conflict with this Court's decisions in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931). Respondents submit that the decision is readily distinguishable from the authorities relied upon by petitioner.

Section 1(5) of the Interstate Commerce Act (49 U. S. C. § 1(5)) requires that charges for the transportation of property "shall be just and reasonable" and prohibits every "unjust and unreasonable" charge. In *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931), it was held that a shipper was entitled to reparation on account of unreasonableness of a joint international rate. However, in neither of the cases cited did the record, *unlike that here*, disclose the *just* and *reasonable* rate for that part of the transportation that was performed solely within the United States.[4] Hence, there was

3. See *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 620-621 (1945).

4. *International Nickel Co.* v. *Director General*, 66 I. C. C. 627 (1922), cited on page 10 of the Petition, also was a case in which there was no evidence of a just and reasonable rate between the border crossing and the destination in the United States.

no basis, in fixing damages, for making a deduction on account of transportation performed beyond the international border, or for awarding any sum less than what petitioner describes repeatedly as "full reparation" (Petition pp. 6, 9, 10).

Thus, in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179, 187 (1927), involving a joint international rate from a point in Canada to a point in the United States, the Court pointed out:

> "The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of."

Similarly, in *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660, 661-662 (1931), in discussing a joint international rate from a point in Mexico to a point in the United States, the Court declared:

> "The Act does not empower the Commission to prescribe or regulate such rates. It applies to international commerce only in so far as the transportation takes place within the United States. The Act applied to the transportation of the cow peas from the boundary to destination and required defendant to establish just and reasonable rates for that service. And defendant was liable to shippers for damages resulting from its failure so to do. §§ 1(1)(c), (2) and (5), 6(1), (7) and 8.
>
> • • • • •
>
> "While the Act does not govern the joint through international rate, the demand for reparation is grounded upon the claim that the maintenance of that rate participated in by the American carrier and its violation of the Act, in failing to maintain a just and reasonable rate for the transportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate."

In the instant case the Court below was not relying as petitioner asserts (Petition p. 7), upon the "mere existence" of a rate between the origins in New Mexico and the border crossings at Detroit and Port Huron. Instead, as the Court point out (App. A of Petition, p. 3), the Interstate Commerce Commission itself had prescribed maximum reasonable rates from the origins to the border crossings retroactively to the very period of time within which petitioner's shipments had moved. This case, therefore, unlike either *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), or *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931), involves the unusual circumstance of the Commission having made a determination of a just and reasonable rate between the New Mexico origins and the border points through which the Canada Packers shipments passed en route to the destinations in Canada. Petitioner has been unable to cite any authorities recognizing jurisdiction of the Commission to award damages for assessment of an international joint rate without deduction of a proportionate share of the charges attributable to transportation performed within a foreign country where, as here, the charges clearly are separable.

Under the circumstances of this case, the Court of Appeals was correct in holding that the maximum reasonable rates from the United States origins to the international border crossings constitute a maximum guide in awarding damages to petitioner. That conclusion is consistent with the strict jurisdictional limitations of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)), as interpreted in *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 620-621 (1945), in which this Court declared:

> "This Court has stated that the 1920 Act, containing this limiting clause, 'applies to international commerce

only in so far as the transportation takes place within the United States.' *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660. The question in that case was as to joint through railroad rates over a railroad route partly in the United States and partly in Mexico. The Court further said as to this situation that 'The Act does not empower the Commission to prescribe or regulate such rates."[9] In *St. Louis B. & M. R. Co.* v. *Brownsville District*, 304 U. S. 295, this Court was called upon to consider whether, under the 1920 Act, there was a duty on the part of American railroads to furnish cars for transportation on a Mexican railroad. It was there held that in the absence of a discrimination against shippers, places, or classes of traffic within the United States, American railroads were 'not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico.' These decisions simply meant that whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad,[10] it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation in foreign countries."

"9. Notwithstanding this, however, the Court held that where such joint rates were voluntarily fixed and charged by an American railroad, the Commission could, under the power given it by the 1920 Act, pass upon the reasonableness of the joint international rate.

"10. See *Knott* v. *Botany Mills*, 179 U. S. 69; *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 129."

Petitioner's apprehension (Petition p. 10) that the decision below will deprive the Commission of the power to award reparation to a shipper for an excessive international rate is misplaced. A careful reading of the opinion indicates that the Court of Appeals concerned itself only with the issue of whether the Interstate Commerce Commission may award damages on account of transportation performed within Canada where the record discloses the

measure of a maximum reasonable rate for the United States portion of the through transportation.

The precise effect of the decision can be gauged by reference to a specific example. Thus, the record discloses that the Commission found, in *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 300 I. C. C. 87 (1957), that at the time petitioner's shipments moved in 1948, the maximum reasonable rate which the carriers could charge on potash from Carlsbad to Detroit was $12.70 per ton, and the Commission awarded reparation in the amount of 62¢ per ton since the carriers had assessed a rate of $13.32 per ton (Dfts. App. pp. 18, 32-33). In the instant case, the Commission, citing its *Consolidated Rendering* decision as its authority, held that the rate of $14.60 which the carriers charged on the Canada Packers shipments that moved from Carlsbad to Toronto via Detroit was in excess of a maximum reasonable rate of $13.80, and awarded reparation for the difference, 80¢ per ton (Dfts. App. pp. 18, 30, 32-33). Obviously, by awarding reparation in the amount of 62¢ per ton on shipments that terminated at Detroit and in the amount of 80¢ per ton on shipments that crossed the international boundary at Detroit and terminated at Toronto, the Commission was awarding 18¢ per ton damages attributable solely to transportation performed in Canada by Canadian railroads which are not parties to this litigation.

The decision of the Court of Appeals prevents Canada Packers from claiming an even greater windfall with respect to shipments that crossed the border at Detroit and went beyond Toronto to Montreal. In these instances the Commission, on the authority of its *Consolidated Rendering* decision, found that the rate charged, $17.20 per ton, was in excess of a maximum reasonable rate of $16.00, and awarded damages in the amount of the difference, $1.20 per

ton (Dfts. App. 18, 30, 32-33). This sum, it will be observed, substantially exceeds the reparation award of 62¢ per ton applicable to Detroit shipments, and even the reparation award of 80¢ per ton applicable to Toronto shipments. It is impossible to attribute the award of more extensive damages on shipments to Montreal than on those terminating at Toronto to anything other than the charges for performing the additional transportation service between Toronto and Montreal, wholly within Canada.

The statutory obligation of the respondents is to maintain a just and reasonable rate between the origin point in the United States and the international boundary, and here the Interstate Commerce Commission made a determination for the respondents of that maximum reasonable rate. Under these circumstances, the determination by that Commission that the rates to the more distant Canadian points contained a greater quantum of unreasonableness than was found to exist in the rate to the border necessarily means that the difference between the two represents and measures the excessive exaction of the Canadian railroads; and it thus necessarily follows that an award of the entire amount of reparation against respondents constitutes an attempt to penalize them for excessive charges collected by Canadian railroads for transportation performed within Canada.

Reversal of the decision below, as sought by petitioner, would make effective an order of the Commission plainly beyond its territorial jurisdiction that, by the strict terms of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)), is applicable "only in so far as such transportation takes place within the United States."

CONCLUSION.

The Interstate Commerce Act requires respondents to establish just and reasonable rates in so far as the transportation takes place in the United States. Here respondents demonstrated what the Commission itself had prescribed as just and reasonable rates between the United States origins and the international border. Therefore, the failure of the Commission to utilize the prescribed rates to the border points as a maximum guide in awarding damages on shipments terminating in Canada is indeed, as characterized by the Court of Appeals, a result that (App. A of Petition, p. 6) "clearly is prohibited by the territorial limitation provisions of Section 1 of the Interstate Commerce Act. 49 U. S. C. A. § 1, *et seq.*"

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

HARVEY HUSTON,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Respondents.

FLOYD STUPPI,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Of Counsel for Respondents.

August 6, 1965

PROOF OF SERVICE.

I, Harvey Huston, attorney for respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 6th day of August, 1965, I served the foregoing brief as follows:

On petitioner by mailing copies, properly addressed, with first class postage prepaid, to Charles B. Myers, 611 Field Building, Chicago, Illinois, 60603.

HARVEY HUSTON.

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No. ~~946~~ //

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CANADA PACKERS, LIMITED,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

CHARLES B. MYERS,
611 Field Building
Chicago, Illinois 60603
Attorney for Petitioner

McCORMICK & HENDERSON INC., CHICAGO, ILL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 346

CANADA PACKERS, LIMITED,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The arguments advanced in respondents' brief in opposition to the petition require only limited reply to demonstrate they lack substance and to point up the lower court's error in accepting those arguments as the basis for its decision.

In effect, the respondents are contending that their liability for damages must be gauged by the domestic rates applying from American origins to the border point crossings. This Court rejected a similar argument in

Lewis-Simas-Jones, 283 U.S. 654, 657, 658, 663, holding that the Commission had jurisdiction and the duty to demine the reasonableness of the joint through international rate which was (as here) the rate the shipper was compelled to pay.

Respondents argue, at page 7 of their brief, that petitioner is unable to cite any authority recognizing the Commission's jurisdiction to award reparation on international joint rates without deduction for that portion of the charges attributable to transportation in a foreign country where, as here, the charges allegedly are separable.

The answer to that contention is already in the record in this very case, for the respondents had argued to the Commission that the damages could not be measured in a matter beyond its jurisdiction, and in response thereto the Commission said:

> As has been pointed out, in the *Consolidated Rendering* case reparation was awarded on shipments which had moved, as here, at joint through rates to Canadian destinations. (App. Dfts., p. 20)

The argument that the charges are separable must necessarily rest on a foundation that they are comparable and are derived from rates of the same character and applicability. But the record plainly shows that the rates from Loving and Carlsbad to Detroit and Port Huron are domestic rates and were not applicable to the through international movement from Carlsbad and Loving to the Canadian destinations in question. Petitioner's point can best be illustrated by quoting what this Court said at page 663 of the *Lewis* case:

> The trial court's findings are not sufficient to show that at the time the shipments in question moved defendant maintained a just and reasonable rate *applicable* to the transportation of such shipment over its

lines from the international boundary to destination. The tariff, as described in the findings, does not purport to apply to the American part of such international transportation. A carload shipment "originating" at Nogales or at the point where the line of the foreign carrier and that of the defendant touch the boundary or in defendant's railroad yard adjacent to the boundary clearly must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier. The former covers local transportation only and involves two terminal services, one at Nogales, the point where received from the shipper, and the other at San Francisco, the place where delivered to the consignee. The latter involves the transportation of a through car from the point of connection and only the one terminal service at destination. It is manifest that a tariff limited, as is that described in the findings, to shipments so originating on defendant's line does not *apply* to the American part of the transportation of an international shipment on a through bill of lading. It is to be presumed that if any tariff covering that part of the through service existed, defendant would have produced it; and, in view of the facts shown, the burden was upon the carrier to bring forward evidence that a rate therefor had been established as required by the act. It follows that the lower court erred in distinguishing this case from the *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, 72 L. Ed. 225, 48 S. Ct. 39, *supra*. That case controls this one. [Emphasis added.]

It is evident from the foregoing that the domestic rate is not of the same character as a joint through international rate, did not apply on the through international shipments and obviously cannot be used as a measure of the American portion of the through charges. Further, this Court has indicated that the Commission cannot consider separately only a portion of through international rates. See *Great Northern Ry. Co.* v. *Sullivan*, 294 U.S. 458.

Next, petitioner respectfully directs this Court's attention to the fact that the respondents' brief carefully avoids any discussion or explanation of why that rule of law (invoked in the *Lewis* case) which holds that connecting carriers are jointly and severally liable as joint tort-feasors for any damages caused by their assessment of an excessive joint through rate, is not appropriate in this proceeding. That rule, petitioner submits, is applicable to the instant case and respondents' efforts to distinguish this case from *Lewis* and *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, are patently invalid.

The discussion at page 9 of the brief to the effect that the Commission awarded reparation in the *Consolidated Rendering* case in the amount of 62 cents per ton while in the instant case reparation was on the basis of 80 cents or, in some cases, $1.20 per ton (the differences between the lower figure and the two higher figures allegedly representing transportation in Canada) does not sustain respondents' position herein. First, the Commission considered, as it must, the entire international rate, that is, the basic rates plus the interim and permanent increases and not simply differences in the amounts of reparation. Secondly, this Court has held (1) that the division of the joint rate among the participating carriers is no concern of the shipper (*Louisville & N.R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234) and (2) that the railroads are liable for the damage caused to the shipper without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier. (275 U.S. 187, 188; 283 U.S. 654, 660)

Finally, although repeatedly challenged by petitioner to do so, respondents do not attempt to explain why the Commission in the present proceeding is constrained by Section 1(2) of the Interstate Commerce Act from awarding reparation "beyond its territorial jurisdiction" but was not so limited in the *Lewis* and *News Syndicate* cases. Petitioner submits that the Commission's action herein was within its power and in complete harmony with those two cases. Respondents argument that this case is distinguishable from *Lewis* and *News Syndicate* is without substance.

CONCLUSION

Petitioner respectfully urges, for the foregoing reasons and for the reasons heretofore stated in the petition, that a writ of certiorari should issue as prayed.

Respectfully submitted,

CHARLES B. MYERS
Attorney for Canada Packers, Ltd., Petitioner
611 Field Building
Chicago, Illinois 60603

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 346

CANADA PACKERS, LIMITED, PETITIONER

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 11, 1965, inviting the Solicitor General to submit the views of the United States.

STATEMENT

Respondents, American railroads whose lines connect with the lines of Canadian railroads, agreed with the Canadian railroads upon joint through international rates for shipments of potash between points in New Mexico and Canada. Petitioner, a shipper who paid the rates, filed a complaint against respondents with the Interstate Commerce Commis-

sion, pursuant to Section 13(1) of the Interstate Commerce Act (49 U.S.C. 13(1)), charging that the rates were "unjust and unreasonable" and therefore contrary to Section 1(5) of the Act (49 U.S.C. 1(5)), and asking reparations in the amount of the alleged overcharge.

The proceeding was stayed by the Commission pending its decision in *Consolidated Rendering Co. v. Atchison, T. & S.F. Ry. Co.*, 287 I.C.C. 673, 300 I.C.C. 87. The Commission there held that respondents' rates for potash shipments from New Mexico to the points on the Canadian border at which the shipments cross en route to their Canadian destinations were unjust and unreasonable due to certain rate increases which the Commission had not approved. The Commission determined the maximum just and reasonable rates that respondents could charge for such shipments. The proceeding on petitioner's complaint then resumed, and the Commission found for petitioner. It held the joint through international rates unjust and unreasonable, determined the just and reasonable rates, and awarded petitioner the difference as reparations. 313 I.C.C. 759. Petitioner then brought this suit against respondents in the district court, pursuant to Section 16(2) of the Act, to collect the Commission's award.

The district court gave judgment for petitioner in the amount awarded in the Commission's order. The Court of Appeals for the Seventh Circuit reversed. 342 F. 2d 563. It held that where the American carrier maintains a rate to the border, the shipper's reparations are limited to the difference between that

rate and the just and reasonable rate, which the Commission here had determined in the *Consolidated Rendering* proceeding. The court reasoned that to hold respondents liable for the entire overcharge under the joint through international rate, including the Canadian segment of the shipment, would be contrary to the territorial limitation on the Interstate Commerce Commission's jurisdiction imposed by the Interstate Commerce Act, which, in Section 1(1) (49 U.S.C. 1(1)), provides that the Act applies to common carriers by rail engaged in transportation "from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States." The court distinguished *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654—where American carriers were held liable to the shipper for the entire overcharge under a joint through international rate—on the ground that in those cases the carriers had published no rates applicable to the American portion of the international shipment.

DISCUSSION

As expressly provided in Section 1(1) of the Interstate Commerce Act, the Interstate Commerce Commission has no power to regulate rail transportation outside of the United States. But where a shipper ships goods from a point in the United States to a point in Canada or Mexico, or from a point in Canada or Mexico to a point in the United States, the Commission's jurisdiction clearly extends to the

American segment of the trip, and it is therefore the Commission's duty under Section 1(5) of the Act to prevent the American carrier from charging an unjust and unreasonable rate for its segment. There are, of course, no difficult questions where the American carrier simply offers a rate for the American leg of the international shipment; the Commission's power to regulate and prescribe such a rate is unquestioned. But the Commission's duty is no less when an American carrier joins with a foreign carrier in offering a joint through rate, whereby the shipper pays a single rate for a through shipment and the carriers divide the proceeds.[1] The rate, while "international", obviously includes a charge for the American as well as the foreign segment of the trip. The Interstate Commerce Commission has the power and the duty to protect the shipper from being overcharged for the American segment of the shipment. The problem of this case is how the Commission is to discharge this responsibility.

1. A joint through international rate is an undivided charge for a shipment that moves both within and without the United States. It may be unjust and unreasonable under the standards of the Interstate Commerce Act, but establishing this to be so may not show whether and in what proportion the overcharge is attributable to the American segment of the shipment, which is all the Commission has the power to regulate directly. To be sure, the divisions which the carriers establish show the portion of the charge re-

[1] Each carrier's share is known as a "division".

ceived by the American carrier, but that does not tell what a proper share of a total reasonable charge would be. Accordingly, it has been the consistent view of the Commission and of this Court that, notwithstanding the territorial limitations of its jurisdiction, the Commission may determine whether a joint through international rate is unjust and unreasonable, and, if it finds that it is, award the shipper reparations representing his entire overcharge under the rate. Because the rate is an undivided and unapportioned charge for the entire through movement, including both the American and the foreign segments, the extent of the overcharge applicable to the American segment is unknown. But it is fairer that the American carrier should pay the entire damages than that it should pay none of them. This is the basic teaching of *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654. See, also, *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 620, n. 9.

Assuming the general rule to be that the carrier is fully liable to the shipper in such a situation, the question becomes whether there is any way for the carrier to limit its liability. At issue here are considerations both of convenience to the shipper and fairness to the carrier. It is, of course, open to the carrier simply to decline to participate in joint through international rates. By offering a rate applicable only to the American segment of the international shipment, the American carrier avoids all

liability for the foreign segment. See *Hoffman-Taff, Inc.* v. *St. Louis-S.F. Ry. Co.*, 279 I.C.C. 710, 712. However, as the Commission has recognized, joint through international rates represent a convenience and advantage to the shipper. See *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, 660, note. Their formation ought therefore not be discouraged. Also, it would be unfair to place the carrier in a position where its liability to pay reparations to shippers depended on circumstances beyond its and the Interstate Commerce Commission's control. Canadian regulatory authorities might forbid Canadian railroads to participate in joint through international rates with American carriers except on terms that would make such rates unjust and unreasonable under American standards, and neither the Commission nor the American carrier could require the Canadian railroad to agree upon a just and reasonable rate. To avoid confronting the American carrier with a Hobson's Choice between foregoing joint through international rates altogether, and assuming full liability to the shipper for damages caused by such rates even where the rate is unjust and unreasonable solely by reason of the actions or policies of the foreign carrier or regulatory body, the American carrier must be permitted to establish that a joint through international rate found to be unjust and unreasonable by the Interstate Commerce Commission is not unjust and unreasonable insofar as the American segment of the shipment is concerned.

2. One possible approach, suggested by certain lan-

guage in the *News Syndicate* and *Lewis-Simas-Jones* decisions, is that the American carrier may escape all liability under a joint through international rate in which it participates by also publishing a just and reasonable rate to the border. We think this approach unsound.

(*a*) Such a rule would rest on the false premise that the only duty imposed on the American carrier by the Interstate Commerce Act with respect to international shipments is to publish a just and reasonable rate applicable to the American portions of such shipments. But a shipment moving under a joint through international rate takes place in part within the United States, and the joint rate is a charge for the American as well as the foreign segment of the total trip. There is no basis in the Act for exonerating the American carrier from all responsibility for the the American portion of the shipment under a joint through international rate merely because it happens also to publish a different rate which appears to be just and reasonable.

(*b*) It is not clear that a just and reasonable rate applicable only to the American portion would always provide the shipper with an adequate alternative. Suppose, for example, that the foreign carrier published no rate applicable to the foreign leg of the through shipment, so that the only way the shipper could ship through to his destination was to pay the joint rate. In such a case, the independent rate published by the American carrier would provide no check upon the freedom of the American carrier to

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overcharge the shipper by fixing an exorbitant joint rate with the foreign carrier.

Or suppose that while the foreign carrier did offer a rate applicable to its segment of the through shipment, the sum of the American and foreign such rates was higher than the joint through international rate, albeit that rate was unreasonably high. Such a situation would be conceivable even if the foreign carrier's independent rate, as well as the American carrier's, was reasonable. A joint through rate is ordinarily lower than a combination of rates, since the "operating costs of a through movement are less than the aggregate costs of the two independent movements covering the same route." *B. & O. S.W. R.R. Co.* v. *Settle,* 260 U.S. 166, 171. Hence, as this Court indicated in *Louisville & N. R. R. Co.* v. *Sloss-Sheffield Co.,* 269 U.S. 217, 233, a carrier's independent rate is not necessarily a fair measure of what a reasonable rate would be for its segment of a joint through rate.

(*c*) The suggested approach is incompatible with the well settled principle that there can be only one rate applicable to a shipment of the same character between the same points (*e.g., B. & O. S.W. R.R. Co.* v. *Settle,* 260 U.S. 166, 172; *Pittsburgh &c. Ry. Co.* v. *Fink,* 250 U.S. 577, 581) and the underlying policy of the Interstate Commerce Act that shippers similarly situated should be treated the same by the carrier, without discrimination. This policy would be thwarted if on the identical shipment over the identical route between an American and a foreign point two different charges—a combination of two

rates and a single joint through rate—were available. Suppose, for example, that the more powerful shippers decided to forego the joint rate and pay the American carrier its rate to the border, in the hope of negotiating advantageous terms with the foreign carrier on the rate charged by that carrier from the border; and suppose they were successful in negotiating a low rate, with the result that they paid less under the combination of rates than they would have under the joint rate. The result would be discrimination between competing shippers, with the stronger paying a lower rate and the weaker a higher rate (cf. *Porter Co.* v. *Central Vermont R. Co.*, 366 U.S. 272), made possible by the American carrier's having offered a choice of rates applicable to the American segment of the shipment.

The Court's references in *News-Syndicate* and *Lewis-Simas-Jones* to the American carrier's alternative of publishing a just and reasonable rate applicable to the American segment of the shipment surely were not intended to undermine the settled policy against rate discrimination. The Court may have meant no more than that the American carrier was not compelled to enter into a joint through international rate at all, but could have satisfied its duties under the Act by foregoing the joint rate and offering a rate applicable only to the American portion of the trip. Having chosen to participate in the joint rate—a choice not forced upon it by the Act—the carrier must accept liability if the rate is unjust and unreasonable.

3. Although the carrier cannot, in our view, escape liability for collecting an unjust and unreasonable joint through international rate merely by publishing a just and a reasonable rate to the border, the damages resulting from an unjust and unreasonable joint international rate can, we think, feasibly be apportioned between the American and foreign carrier, and the liability of the former limited to so much of the excessive charge under the rate as is allocable to the American segment of the shipment. The burden of limiting its liability would be on the carrier. It would be required to prove the amount of the just and reasonable charge for the American segment of the shipment under the joint rate. Its damages would then be computed by subtracting that amount from the amount it actually collected under its divisions agreement with the foreign carrier.

An example will illustrate. Suppose the joint through international rate between New York and Toronto on shipments of potash is $20. A shipper complains to the Commission that this is unjustly and unreasonably high; the Commission determines that the just and reasonable rate is $15; and the American carrier proves that with due regard to the relative mileage of the American and Canadian portions of the journey and to other relevant factors the just and reasonable charge for the American leg of the shipment is $5. This charge would then be compared with the actual divisions agreed upon by the carriers for allocating the revenue under the unjust and un-

reasonable $20 rate. If the American carrier's division was $7, the reparations due the shipper would be $2, the amount by which he was unjustly and unreasonably overcharged for the American segment of the shipment.

Under the rule we suggest for limiting the American carrier's liability, just and reasonable joint through international rates would be fostered. The American carrier would not be reluctant to participate in such rates, knowing that it could avoid liability for reparations by accepting a division no greater than would be the just and reasonable charge for its portion of the journey. But it would not be free to overcharge shippers, since, if it received any more than such reasonable charge, it would be open to a suit by the shipper seeking a refund of the excess. To be sure, the shipper might still be overcharged by American standards, depending on the division demanded by the Canadian carrier. But a charge levied by a foreign carrier and applicable solely to the foreign segment of a joint through international rate is not within the intended scope of the Interstate Commerce Act. If the carrier sustains the burden—and we emphasize that the burden of mitigating damages is upon the carrier, as the Court clearly indicated in *News Syndicate* and *Lewis-Simas-Jones*—of demonstrating that the charge fairly applicable to the American segment of a joint through international rate is less than its division of the total rate, the carrier's damages should be reduced accord-

ingly—and eliminated altogether if it can prove that it received no more than the amount to which it would have been entitled had the rate been just and reasonable.[2]

4. The problem discussed in this memorandum is a difficult and important one. Its implications have never, so far as we are aware, been adequately explored. We think Supreme Court consideration of the question is warranted and that this case presents an appropriate occasion for such review. The court below held that where, as here, the American carrier, besides participating in joint through international rates, establishes independent rates to the border, the measure of its damages, if the joint rates are found to be unjust and unreasonable, is the difference between the independent rates that it published and the amounts the Commission determined to be the just and reasonable such rates. As applied here, this method of computing damages is unsound in two respects. First, it has not been shown that the independent rates determined by the Commission to be just and reasonable were in fact applicable to the American segment of the international through shipments. Like the rate in *Lewis-Simas-Jones Co.* v. *Southern Pacific*

[2] The method of mitigating damages we propose is analogous to that employed by the Commission in divisions cases involving domestic joint through rates. See Section 15(6) of the Interstate Commerce Act, 49 U.S.C. 15(6); *New England Divisions Case*, 261 U.S. 184; *Beaumont, Sour Lake & Western Ry. Co.* v. *United States*, 282 U.S. 74; *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349.

Co., 283 U.S. 654, 663, they may have been applicable only to shipments whose ultimate destinations were points on the border. Obviously, a rate that includes a terminal charge for unloading at the border is not a fair measure of the charge applicable to the American segment of a continuous shipment to a foreign destination.

Second, in computing damages, the court erroneously subtracted the charge applicable to the American leg of the international shipments from the independent rates actually published by the American carriers, rather than from the divisions received by the American carriers under the joint rates. As noted earlier, there can be only one rate applicable to a shipment; if for the same shipment both a joint through rate and a combination of rates are published, the carrier must charge and the shipper must pay the joint rate. *E.g., Louisville & N. R. R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234; *Consolidated Fruit Co.* v. *Atlantic Coast Line R. Co.*, 300 I.C.C. 399, 403. Thus, in the present case, the shipper had no real choice between the American carriers' independent rates and the joint through international rates; he had to pay the latter. Why, then, should the independent rates limit the shipper's damages?

CONCLUSION

Since the substantial questions discussed in this memorandum appear to be inescapably presented by

this case, we urge that the petition for a writ of certiorari be granted.[3]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

RICHARD A. POSNER,
Assistant to the Solicitor General.

ROBERT B. HUMMEL,
JOHN T. MARSHALL,
Attorneys.

DECEMBER 1965.

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[3] The Interstate Commerce Commission joins the Solicitor General in urging that the petition for a writ of certiorari be granted. On the merits of the question presented by this case, the Commission has asked that its views be stated as follows:

"The Commission's position on the issues presented by the petition for certiorari is that the petition should be granted and the decision below reversed on the narrow grounds that the respondent railroads were fully liable for all unlawfulness in the joint international rates charged the petitioning shipper. Since the joint rates and only the joint rates applied to this traffic, the respondent railroads, consistent with the opinions of this Court in *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, and in *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, were joint tortfeasors when they charged the shipper unjust and unreasonable rates. Under the rule of these cases, consistently followed by the Commission, the railroads are liable for all damages resulting from their violation of the Interstate Commerce Act in charging unlawful joint rates, including damages to the extent the movements took place within Canada.

"Whether these carriers might have limited their liability by filing some other rates applicable to this traffic, such as local or proportional rates from New Mexico origins to the

border points, is essentially immaterial. The joint rates which the carriers maintained for this traffic took precedence over all combinations of intermediate rates. *Baltimore & O.S.W. R.R. Co.* v. *Settle*, 260 U.S. 166, 172; *Kansas City So. Ry.* v. *Albers Comm.*, 223 U.S. 573, 597–98; *Louisville & N. R.R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234; a rule now codified in the tariff regulations of the Commission (49 C.F.R. 141.55).

"The Commission finds no need to limit the liability of U.S. carriers under joint rates under a theory that the filing of such rates must be encouraged. Only a handful of cases arise each year before the Commission involving international rates, and there is no indication from any quarter that the potential liability of U.S. carriers for the entire unlawfulness of joint rates discourages their publishing such rates. Nor is it material that the carriers might in the future choose to file only rates to the border on a higher basis than the present joint rates; for the Commission would retain authority to prescribe the intermediate rates on the basis of the prior division of the joint rates if the same through service was being provided under a combination of rates in lieu of joint rates. The present case falls squarely within the holding of this Court in *News Syndicate*, later reaffirmed in *Lewis-Simas-Jones* under the rationale of joint tortfeasors, that since the railroads filed no intermediate rate legally applicable to the domestic leg of this traffic, but rather 'compelled plaintiff in error to pay the through charges complained of * * * the Commission had jurisdiction to determine the reasonableness of the charges exacted.' (275 U.S. at 187.)"

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No. 345 //

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CANADA PACKERS, LIMITED, PETITIONER

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FILED ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

CHARLES B. MYERS,
611 Field Building
Chicago, Illinois 60603
Attorney for Petitioner

Due: January 3, 1966

McCORMICK AND HENDERSON, INC., CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 346

CANADA PACKERS, LIMITED, PETITIONER

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FILED ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

Responsive to the Court's invitation in its order of October 11, 1965, the Solicitor General has submitted a memorandum, as *amicus curiae,* setting forth the views of the United States. The memorandum includes a separate expression of views submitted on behalf of the Interstate Commerce Commission, in which the Commission joins the Solicitor General in urging the Court to grant the petition for a writ of certiorari. Petitioner, of course, is in full accord with these prayers. It is also in complete agreement with the discussion and arguments presented by the Commission in support of its position. The Commission's

views are essentially the same as those urged by petitioner in its plea for issuance of the writ. While concurring generally with the presentation of the Solicitor General, petitioner has serious reservations regarding his suggestion that the Court review existing tests as to the measure of damages and that it establish new criteria for gauging the liability of American railroads.

Full liability no deterrent to joint rates.

The Solicitor General states, at page 5 of the memorandum, the current rule of law governing the American lines' liability for reparations in cases like the present one:

> Accordingly, it has been the consistent view of the Commission and of this Court that, notwithstanding the territorial limitations of its jurisdiction, the Commission may determine whether a joint through international rate is unjust and unreasonable, and, if it finds that it is, award the shipper reparations representing his entire overcharge* under the rate. (Footnote added.)

The foregoing statement is a correct summation of the rulings of *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179 (1927) and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654 (1931). Although recognizing that the present case clearly falls within the ambit of these decisions, the Solicitor General is concerned that this rule will discourage American railroads from entering into joint through international rates to the inconvenience and disadvantage of shippers. He also indicates that it would be unfair to place the carrier in a position where its liability for full reparation may be dependent on circumstances beyond its and the Interstate Commerce Commission's control.

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* The word "overcharge" obviously is not used in its technical sense but to express the amount in excess of the rate found to be just and reasonable.

From the foregoing, the Solicitor General concludes that, in fairness, the American carrier must be permitted an opportunity to prove that the joint through international rate, found to be unjust and unreasonable by the Interstate Commerce Commission, is not unjust and unreasonable insofar as the American segment of the shipment is concerned. He would require the carrier to carry the burden of proving the amount of the just and reasonable charge for the American segment of the rate, and its damages would then be computed by subtracting that amount from the amount actually collected under its divisions agreement with the foreign line.

With all due respect to the Solicitor General, petitioner believes that his concern for the future of joint through international rates is unfounded. The principle established by the *News Syndicate* decision, which petitioner submits is controlling here, was announced in 1927, or almost forty years ago and reaffirmed in 1931 in the *Lewis* case. Yet the United States carriers have continued to this day to publish joint through international rates with foreign line connections. History alone strongly indicates that the American lines have not been deterred in making such rates. Further, the Interstate Commerce Commission does not share the concern of the Solicitor General as to the need to limit the liability of U.S. carriers under the theory that the filing of joint rates must be encouraged. As the Commission points out in its separate statement of views (page 15 of the Memorandum), only a handful of cases arise each year involving international rates, and "there is no indication from any quarter that the potential liability of U.S. carriers for the entire unlawfulness of joint rates discourages their publishing such rates."

The Solicitor General believes there is an element of unfairness in the present rule because under it American lines could be held fully liable for damages even where the

rate is unjust or unreasonable solely by actions or policies of foreign regulatory bodies or foreign carriers. Petitioner urges that this line of reasoning overlooks the fact that the American lines would not enter into joint through international rates if it were not to their advantage to do so. Their arrangements with their foreign counterparts are voluntary, contractual undertakings which they can, so far as this record discloses, negotiate and enter into or not as they see fit. Presumably, the American carriers could include in any joint rate agreement a requirement that the Canadian lines share in or otherwise reimburse the American railroads for a proportion of any reparations which the American lines may be called upon to pay for transportation within Canada. The U.S. railroads as contracting parties to joint rates, are in far better position to protect themselves and to control the level of the rates than is a shipper who is compelled to pay the result of the carriers' agreement when published in a rate tariff. If the shipper is aggrieved by the charge, its only remedy for damages is by action before the Commission while the carrier is in position to guard against contingencies in its contract with the foreign line.

This Court has rejected the divisions approach.

The concept of limited liability suggested by the memorandum is not entirely new. A similar contention was raised as to domestic traffic and rejected by this Court as unsound in *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U.S. 217 (1925). The rates in question in that case were "strictly joint through rates" (page 233) which the Commission had held exceeded maximum reasonable rates by 35 cents per ton. Reparation was awarded on that basis. Louisville & Nashville contended that the reparation award was void as to it to the extent it exceeded 23 cents which

amount the railroad claimed was its share of the excessive charges, based on divisions with its connecting lines.

In rejecting that argument, the Court said at page 234:

> The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier.
>
> * * *
>
> The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole.

The argument advanced in that case is similar to the Solicitor General's suggestion that the American line, in the case of joint through international rates, should be held liable only for the amount that its division exceeds the American segment of the rate found just and reasonable. The Solicitor General's position incorrectly places emphasis on the damages to the carrier and does not recognize, as the Court found in the *Sloss-Sheffield* case, that the liability arises out of the wrongful exaction from the shipper—not out of the unjust enrichment by the carrier.

Petitioner entitled to full recovery under any test.

Assuming for the purposes of argument that the Solicitor General's suggestion is sound, respondents herein then have the obligation of showing that the American segments of the New Mexico to Canada rates were just and reasonable and of also showing the divisions which they received for that portion of the transportation. But there is nothing in the record before the Commission on the matter of divisions or on the American segments of the rates. Thus respondents have failed to sustain their burden of proof. In that circumstance and consistent with the Solicitor Gen-

eral's view the general rule of liability must apply and petitioner would be entitled to full reparation.

While petitioner believes it is entitled to full recovery under the tests advocated by the Solicitor General, it very strongly urges that the position of the Interstate Commerce Commission is a sounder approach to the proper disposition of this case. Petitioner agrees with the Commission that "... the petition should be granted and the decision below reversed on the narrow grounds that the respondent railroads were fully liable for all unlawfulness in the joint international rates charged the petitioning shipper."

This case, petitioner submits, falls squarely within the Court's decisions in *News Syndicate* and *Lewis*, and there is no occasion, under the circumstances here present, to pass upon the alternative measure of damages suggested by the Solicitor General.

Respectfully submitted,

CHARLES B. MYERS
Attorney for Canada Packers, Ltd., Petitioner
611 Field Building
Chicago, Illinois 60603

Due: January 3, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 946

CANADA PACKERS, LIMITED,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

HARVEY HUSTON,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Respondents.

FLOYD STUPPI,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Of Counsel for Respondents.

Due: January 24, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 346.

CANADA PACKERS, LIMITED,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY, ET AL.,[1]

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

STATEMENT.

In response to the Court's order of October 11, 1965, the Solicitor General has submitted a Memorandum expressing the views of the United States. Therein the

1. The Atchison, Topeka and Santa Fe Railway Company; The Chesapeake and Ohio Railway Company; Chicago, South Shore and South Bend Railroad; Detroit, Toledo and Ironton Railroad Company; Elgin, Joliet and Eastern Railway Company; Grand Trunk Western Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Wabash Railroad Company.

Solicitor General urges that the petition for a writ of certiorari be granted.

DISCUSSION.

It is submitted by respondents that the reasons advanced by the Solicitor General will, upon careful analysis, be found insufficient to warrant review by the Court on certiorari. The basic issue here is whether the Interstate Commerce Commission, in assessing damages on account of unreasonable freight charges for railroad transportation of shipments of potash from New Mexico, may penalize carriers to a greater extent on petitioner's international shipments moving into Canada than on contemporaneous shipments traversing only the United States portion of such routes, with the penalties made progressively more severe in relation to the quantity of transportation that takes place within Canada.[2]

Respondents are not in disagreement with much of the discussion of general principles contained within the Memorandum for the United States and, in this reply, will, in so far as is practicable, discuss only the propositions upon which there is disagreement.

1. On page 5 of his Memorandum, the Solicitor General makes the following statement:

> "Because the rate is an undivided and unapportioned charge for the entire through movement, including both the American and the foreign segments, the extent of the overcharge applicable to the American segment is unknown."

Although the foregoing statement might be pertinent as

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2. A question of interpretation of the Commission's reparation order was also considered, but not resolved, by the Court of Appeals. This issue was not referred to by the Solicitor General, although it was discussed in the Brief for Respondents In Opposition (pp. 3-4).

applied to situations in which the crucial question of reasonableness or unreasonableness was truly unknown, it is not applicable to the instant situation. As the Court of Appeals pointed out (342 F. (2d) 563, 564), the Interstate Commerce Commission itself, in *Consolidated Rendering Company* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 300 I.C.C. 87 (1957), had made a finding as to maximum reasonable rates on potash from the origins in New Mexico to the border crossings at Detroit and Port Huron retroactively to the very period of time within which petitioner's shipments moved (App. A of Petition, pp. 3-4; App. Dfts.[3] pp. 30-33). This case, therefore, unlike either *News Syndicate Company* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), or *Lewis-Simas-Jones Co.* v. *Southern Pacific Company*, 283 U. S. 654 (1931), involves the unusual circumstance of the Commission having made a determination of a just and reasonable rate between the New Mexico origins and the border points through which the Canada Packers shipments passed en route to the destinations in Canada. Awarding a greater quantum of damages in connection with the Canada Packers shipments, where those shipments differed only because additional transportation was performed beyond the Canadian border, clearly identifies the award as an attempt by the Commission to regulate rail transportation within Canada, in violation of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)). That section explicitly confines the Commission's jurisdiction "only in so far as such transportation takes place within the United States."

2. On page 10 of his Memorandum, the Solicitor General discusses the question of apportioning damages resulting from an unjust and unreasonable joint international rate and makes the following suggestion:

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3. For brevity, the Appendix of Defendants-Appellants is referred to here as App. Dfts.

> "The burden of limiting its liability would be on the carrier. It would be required to prove the amount of the just and reasonable charge for the American segment of the shipment under the joint rate."

This is precisely the burden that has been sustained by the respondents. No better proof of the measure of unreasonableness of the American portion of the joint international rate could be found than a specific finding by the Interstate Commerce Commission of what a contemporaneous maximum reasonable charge should be for the American portion of the international shipments, and that was determined by the Commission's decision in *Consolidated Rendering Company* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 300 I. C. C. 87 (1957). In fact, not only did the *Consolidated Rendering* case contain findings as to maximum reasonable rates to the border crossings, but that decision was relied upon by the Commission in this case as its direct authority for a finding that the joint international rates were unjust and unreasonable to the extent that certain general rate increases temporarily authorized by the Commission were later found excessive (App. Dfts. pp. 14-20).

3. The Court of Appeals held that where, as here, carriers had sustained their burden of mitigating damages by demonstrating a maximum reasonable standard for the United States portion of the through transportation, no damages beyond that measure could be awarded without constituting a regulation of transportation that took place within Canada (342 F. (2d) 563, 565; App. A. of Petition, pp. 5-6).

The Solicitor General apparently disagrees with the Court below in two respects: (a) in its determination that the respondents properly had met the burden of mitigating damages, and (b) even if that burden had been met, a somewhat different method of calculating damages should have been employed.

As to his claim that respondents had not met the burden of mitigating damages by reliance upon a decision of the Commission as to maximum reasonableness of rates to the border crossings, the Solicitor General states (p. 13):

> "Obviously, a rate that includes a terminal charge for unloading at the border is not a fair measure of the charge applicable to the American segment of a continuous shipment to a foreign destination."

There is no basis in the record for the Solicitor General's assumption that the rates on potash to Detroit and Port Huron, the border crossings involved, included "a terminal charge for unloading." Not only is there no reason to assume that the carrier performed the service of unloading in connection with such rates, but, in *Consolidated Rendering Company* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 300 I. C. C. 87, 95 (1957), the Commission made the following observations:

> "Potash is moved from the mines to a processing center in the plant area by the shipper. From the plant, the shipper moves it to the originating carrier's hold tracks, and from thence it is transported to primary fertilizer-mixing plants. *Terminal operations are relatively simple.*" (Emphasis supplied.)

See also *Woodward & Dickerson, Inc.* v. *International Great Northern Railroad Co.*, 287 I. C. C. 296, 298 (1952), in which the Commission pointed out that the duty of unloading carload shipments ordinarily rests with the consignee, rather than with the carrier.

Reliance upon the prescribed rates to the border crossings as a maximum guide in awarding damages on these shipments to Canadian destinations will, in a very real sense, prevent the reparation award from having an extraterritorial effect in violation of the restrictions of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)).

For example, the record discloses that the Commission

found, in *Consolidated Rendering Company* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 300 I. C. C. 87 (1957), that at the time petitioner's shipments moved in 1948 the maximum reasonable rate which the carriers could charge on potash from Carlsbad, New Mexico to Detroit was $12.70 a ton, and the Commission awarded reparation in the amount of 62¢ per ton since the carriers had assessed a rate of $13.32 per ton (App. Dfts. pp. 18, 32-33). In the instant case the Commission, citing its *Consolidated Rendering* decision as its authority, held that the rate of $14.60 which the carriers assessed on the Canada Packers shipments that moved from Carlsbad to Toronto via Detroit was in excess of a maximum reasonable rate of $13.80, and awarded reparation for the difference, 80¢ per ton (App. Dfts. pp. 18, 30, 32-33). Obviously, by awarding reparation in the amount of 62¢ per ton on shipments that terminated at Detroit and in the amount of 80¢ per ton on shipments that crossed the international boundary at Detroit and terminated at Toronto, the Commission was awarding 18¢ per ton damages attributable solely to transportation performed in Canada by Canadian railroads.

Furthermore, the Commission has attempted to escalate the damages in direct proportion to the amount of transportation performed within Canada. Thus, in those instances in which petitioner's shipments crossed the border at Detroit and went beyond Toronto to Montreal, the Commission awarded damages not merely to the extent of 62¢ per ton (as at Detroit), or even 80¢ per ton (as at Toronto), but in the much greater sum of $1.20 per ton (App. Dfts. pp. 18, 30, 32-33). Yet, manifestly, the only difference between the shipments terminating at Toronto and those terminating at Montreal consists of the additional transportation service *within Canada* received by the latter, and the greater

damages awarded on such shipments can be attributed only to excessive zeal on the part of the Commission in its efforts to regulate Canadian transportation.

Concerning the question of computing damages, the Solicitor General states (p. 13):

> "Second, in computing damages, the court erroneously subtracted the charge attributable to the American leg of the international shipments from the independent rates actually published by the American carriers, rather than from the divisions received by the American carriers under the joint rates."

Respondents submit that the Solicitor General's statement as to what the Court of Appeals did in computing damages is confusing. What the Court actually held is that the damages should be based on the difference between the rates published to the border crossings at the time the shipments moved and the maximum reasonable rates to the border which the Commission found should have been in effect at that time ($13.32 versus $12.70 per ton, or a difference of 62¢ per ton).

Apparently the Solicitor General would prefer that damages be computed by subtracting the maximum reasonable charge for the United States portion of the international transportation from the divisions received by the United States carriers. This suggestion is not without merit inasmuch as it would seem to insure that the United States carriers would not be required to pay damages representing payment for transportation performed within Canada, and the practical result might not differ in substance from the disposition by the Court of Appeals. The basis for such an award of damages is questionable, however, since it has been held by this Court that the division of a joint rate among participating carriers is a matter which does not concern the shipper. *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 234 (1925).

It is submitted that the method approved by the Court of Appeals for computing damages is more appropriate, since the award to the shipper is identifiable readily as the portion of the unreasonable charges paid by the shipper that is attributable to transportation performed within the United States.

4. The following statement appears on page 13 of the Memorandum:

> "Thus, in the present case, the shipper had no real choice between the American carriers' independent rates and the joint through international rates; he had to pay the latter. Why, then, should the independent rates limit the shipper's damages?".

The foregoing comment implies that the the Court below limited the shipper's damages because of the mere existence of "independent rates," presumably referring to rates contemporaneously in effect to the border crossings. That is not what is involved here. What the Court of Appeals did hold is that, where the Commission has made a finding of what would be a maximum reasonable rate to the border crossing, that finding becomes the maximum standard in assessing damages on shipments that moved contemporaneously through that crossing to various destinations beyond the border.

Responding to the specific question raised above, the maximum reasonable rate to the border should indeed limit the shipper's damages, for otherwise, in conflict with the provisions of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)), the shipper would be receiving damages from American railroads on account of charges for transportation performed within Canada by Canadian railroads. Obviously the award cannot be deemed to relate only to transportation within the United States, for the Commission expressly found that the measure of unreasonableness in the charges from Carlsbad to Detroit

was 62¢ per ton. It would be contrary both to logic and to law to say that the Commission can hold contemporaneously that the charges from Carlsbad to Detroit were unreasonable by 62¢, 80¢, and $1.20. The only way to explain the difference between the 62¢ award and the 80¢ and $1.20 awards is that the latter two are a measure of the unreasonableness which the Commission found to exist for the hauls beyond Detroit. The decision of the Court of Appeals thus has the salutary effect of restricting the Commission's award of damages within the confines of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)) as construed in *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 621 (1945), in which the Court declared:

> "These decisions simply meant that whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad, it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation within foreign countries."

CONCLUSION

The issue here is whether petitioner is entitled to additional damages in the amount of $1,390.55, plus interest, clearly attributable, within the unique circumstances presented, to the allegedly unreasonable charges for transportation performed in 1948 within Canada. Review by the Court on certiorari is not warranted.[4]

Respectfully submitted,

HARVEY HUSTON,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Respondents.

FLOYD STUPPI,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Of Counsel for Respondents.

Due: January 24, 1966.

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4. The views of the Interstate Commerce Commission are presented in a footnote to the Solicitor General's Memorandum (pp. 14-15). The Commission mistakenly describes the issue here to be whether the award of damages can be limited territorially by the mere filing of an "intermediate rate legally applicable to the domestic leg." Respondents submit that the real issue is whether the Commission, in assessing damages, may penalize carriers to a greater extent on international shipments moving into Canada than on contemporaneous shipments traversing only the United States portion of such routes, with the penalties on the international shipments made progressively more severe in direct relation to the amount of transportation performed within Canada.

PROOF OF SERVICE

I, Harvey Huston, attorney for respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of January, 1966, I served the foregoing reply as follows:

On petitioner by mailing a copy, properly addressed, with first-class postage prepaid, to Charles B. Myers, 611 Field Building, Chicago, Illinois, 60603;

On the United States by mailing copies, properly addressed, with air mail postage prepaid, to each of the following: Thurgood Marshall, Solicitor General, Donald F. Turner, Assistant Attorney General, Richard A. Posner, Assistant to the Solicitor General, Robert B. Hummel, Attorney, and John T. Marshall, Attorney, Department of Justice, Washington, D. C., 20530.

HARVEY HUSTON.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 11

CANADA PACKERS, LIMITED, PETITIONER

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (R. 36–40) is reported at 342 F. 2d 563. The findings of fact and conclusions of law of the district court (R. 33–34) are not reported. The report (R. 9–17) and order (R. 19–21) of the Interstate Commerce Commission are reported at 313 I.C.C. 769.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1965, and a timely petition for rehearing was denied on April 16, 1965 (R. 41–42). The petition for a writ of certiorari was filed on July 14,

1965, and granted on February 21, 1966 (R. 43, 383 U.S. 906).

STATUTES INVOLVED

Section 1 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1, provides:

> (1) CARRIERS SUBJECT TO REGULATION.
>
> The provisions of this chapter shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment * * *
>
> * * * * *
>
> (c) * * * from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation * * * takes place within the United States.
>
> (2) TRANSPORTATION SUBJECT TO REGULATION.
>
> The provisions of this chapter shall also apply to such transportation of passengers and property, but only insofar as such transportation takes place within the United States * * *.
>
> * * * * *
>
> (5) JUST AND REASONABLE CHARGES.
>
> All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such

service or any part thereof is prohibited and declared to be unlawful.

* * * * *

Section 6 of the Act, 24 Stat. 380, as amended, 49 U.S.C. 6, provides in pertinent part:

> (1) SCHEDULE OF RATES, FARES, AND CHARGES; FILING AND POSTING.
>
> Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. * * *

* * * * *

Section 8 of the Act, 24 Stat. 382, as amended, 49 U.S.C. 8, provides in pertinent part:

> In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of

any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

QUESTION PRESENTED

Section 1(1) of the Interstate Commerce Act provides that the Interstate Commerce Commission has no power to regulate rail transportation outside of the United States. The basic question presented, in the view of the United States, is whether, when an American railroad establishes with either a Canadian or a Mexican railroad a joint through international rate, the Commission may find the rate to be unjustly and unreasonably high in its entirety, determine the maximum reasonable rate, and award a complaining shipper the difference as reparations. A subsidiary question is whether, and to what extent, the amount of reparations in such a case is limited by a prior Commission determination of the maximum reasonable rate that the American carrier may charge for a shipment to the place where shipments traveling under the joint through international rate cross the international border.

INTEREST OF THE UNITED STATES

1. While this case was pending on petition for a writ of certiorari, the Solicitor General was invited by the Court to submit the views of the United States (382 U.S. 803), and a memorandum setting forth our tentative views and urging that the writ be granted was filed. Further study and reflection have convinced us that, while the general approach sketched

in that memorandum is sound, the specific method we suggested for computing reparations in cases involving joint through international rates is unnecessarily cumbersome, and in some respects erroneous. A further expression of the government's views therefore seems appropriate.*

2. Congress has recognized the interest of the United States in the regulation of transportation by making the United States a party to most judicial review proceedings involving orders of the Interstate Commerce Commission. 28 U.S.C. 2322. To be sure, neither the United States nor the Interstate Commerce Commission is a statutory party to judicial proceedings for the enforcement of reparations orders, since such proceedings ordinarily involve relatively narrow issues, important only to the injured shipper and the defendant railroad and not to the public at large. 49 U.S.C. 16(2), 16(12). See, generally, *Interstate Commerce Commission* v. *Atlantic Coast Line Railroad Co.*, 383 U.S. 576. The present reparations case, however, raises major issues of public policy and statutory interpretation, touching upon the foreign commercial relations of the United States as well as upon the regulation of transportation within the United States. This is further reason for undertaking to set forth the government's views.

STATEMENT

Canada Packers, the petitioner, is a Canadian corporation which manufactures fertilizer in several

*The present brief is submitted on behalf of the United States only. The Interstate Commerce Commission is considering whether it wishes to file a statement of its own views at a later date.

plants located in Canada (R. 25). In 1948, it procured and paid for certain shipments of potash from places in New Mexico to its Canadian plants. These shipments moved by rail under joint through rates established by American and Canadian railroads having connecting lines (R. 26), and crossed the international border at Detroit and Port Huron, Michigan, among other points (R. 27).

In 1950, Canada Packers, pursuant to Section 13(1) of the Interstate Commerce Act, 49 U.S.C. 13(1), filed an informal complaint with the Interstate Commerce Commission claiming that the joint through rates under which it had made these shipments were unjust and unreasonable within the meaning of Section 1(5) of the Interstate Commerce Act (pp. 2–3, *supra*), and asking reparations (R. 27). The Commission deferred action on this complaint pending its decision in related cases, principally *Consolidated Rendering Company* v. *Atchison, Topeka & Santa Fe Railway Company* (ICC Docket 30578). At issue in that case was the lawfulness of rates charged by American carriers for potash shipments from the identical places in New Mexico from which the shipments in the instant case originated, to the border points—like Detroit and Port Huron—where the shipments involved in the instant matter crossed the international border *en route* to their Canadian destinations (R. 27–30). On March 18, 1957, the Commission found that these rates to the border were unreasonably high, established maximum reasonable rates therefor, and determined that shippers who had paid the unlawful rates were entitled to reparations (300 I.C.C. 87, R. 29).

After the *Consolidated Rendering* case was decided by the Commission, Canada Packers, on October 28, 1959, timely filed with the Commission a formal complaint (R. 5–9) repeating the allegations of its informal complaint. The Commission, in a report issued on May 24, 1961, held that the joint through rates under which Canada Packers had shipped from New Mexico to Canada were, as the shipper contended, unjustly and unreasonably high (313 I.C.C. 759, R. 9–17). It based its determination upon a comparison of those rates with rates which the Commission had determined to be the maximum reasonable rates for shipments of the same commodity from the same places over a comparable distance within the United States; among the rates thus used for purposes of comparison were the rates to the border involved in the *Consolidated Rendering* decision (R. 15). While disclaiming any power to prescribe for the future maximum reasonable joint rates for international shipments (R. 14), the Commission awarded Canada Packers the entire difference between the joint through rates that it had paid and what the Commission determined to be the maximum reasonable rates (R. 17, 19–21). The Commission summarily rejected (R. 16) the railroads' contention that, in so measuring the shipper's damages, the Commission was exceeding its territorial jurisdiction under Section 1(1) of the Interstate Commerce Act (p. 2, *supra*).

The railroads partially complied with the Commission's reparations order, paying Canada Packers $5,304.01 (plus interest) of the $6,694.56 specified in

the Commission's reparations order. It appears that they arrived at the $5,304.01 figure by deducting from the amount specified in the Commission's order that portion of the charges that had been retained by the Canadian railroads participating in the joint through rates. (R. 32.)

Canada Packers filed suit against the railroads[1] under Section 16(2) of the Interstate Commerce Act in a federal district court for the balance (R. 1). The district court entered judgment for the amount asked by Canada Packers (plus interest and a reasonable attorney's fees), reasoning that the American railroads' failure to establish lawful rates applicable to the transportation performed by them within the United States had compelled Canada Packers to pay the joint through international rates, and that, in consequence, the Commission was justified in awarding Canada Packers the full amount by which those rates exceeded the maximum reasonable rates as determined by the Commission (R. 33–34).

The railroads appealed, and the Court of Appeals for the Seventh Circuit reversed (342 F. 2d 563, R. 36). Referring to the Commission's *Consolidated Rendering* decision, the court of appeals noted that rates to the border had been in effect in 1948 when the shipments in question occurred, and that the Commission had found them to be unreasonably high

[1] Only the American railroads participating in the joint through rates in question were named in the district court complaint, though the Canadian carriers had been named as defendants, along with the American carriers, in the proceeding before the Commission (R. 6).

and established maximum reasonable rates. In these circumstances, the court held, Canada Packers' damages were limited to the difference between the existing rates to the border and the maximum reasonable rates therefor as determined by the Commission; any greater award, the court concluded, would exceed the Commission's territorial jurisdiction (R. 38–40). The court distinguished *News Syndicate Company* v. *New York Central Railroad Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654 (where American carriers had been held liable to complaining shippers for the entire difference between the joint through international rates which they had charged and what the Commission determined the maximum reasonable rates to be), on the ground that, in those cases, the carriers had not, as here, published rates to the border; hence, the shippers had been compelled to pay the joint through international rates (R. 39–40).

ARGUMENT

INTRODUCTION AND SUMMARY

Section 1(1) of the Interstate Commerce Act, 49 U.S.C. 1(1), makes the provisions of the Act applicable to common carriers by rail engaged in transportation "from or to any place in the United States to or from a foreign country, *but only insofar as such transportation * * * takes place within the United States*" (emphasis added). Thus, if an American railroad charged a shipper merely for transportation to,

and unloading at, a point on the international border, and the shipment was then reloaded onto a Canadian railroad,[2] which levied another charge for the transportation of the shipment to its ultimate destination within Canada, the Interstate Commerce Commission would clearly be barred by Section 1(1) from attempting to regulate the charge collected or the other incidents of the transportation service furnished by the Canadian carrier, although the Commission's authority to regulate the charge levied by the American carrier would be unimpaired. But in the usual case a rail shipment between an American (or foreign) place of origin and a foreign (or American) destination is not unloaded at the border and then reloaded onto a different carrier. American and Canadian, and American and Mexican, railroads have connecting lines and arrangements for car interchanges. Shipments between places in the United States and places in these adjacent foreign countries thus can, and do, travel in a continuous movement across the international borders. Where that is done, the American and foreign carrier may agree upon a single charge for the through shipment and divide the proceeds (such a charge being known as a "joint rate", see *e.g., Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 233); or each may establish a rate, known as a "proportional rate," for its portion of the through ship-

[2] The present case involves rail transportation between the United States and Canada. Its principles are, of course, equally applicable to rail transportation between the United States and Mexico. See, *e.g., Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654.

ment.[2] In either case, a fundamental question of the limits of the Commission's regulatory authority is raised: May the Commission, notwithstanding the territorial limitation in Section 1(1), determine the lawfulness of a joint through international rate (or of a combination of proportional rates relating to a through international shipment) as a whole, and award reparations on the basis of its determination; or is it limited to determining the lawfulness of that portion of the charge applicable to the American leg of the trip? That question is inescapably presented by the instant case, and the importance of answering it correctly is manifest. A substantial traffic moves by rail between the United States and its neighbors to the south and north. Our good relations with those countries, as well as the welfare of the shippers and carriers involved in this traffic, may thus be affected by the decision here.

The basic proposition advanced in this brief is that the Commission has no power to determine what is a reasonable charge for a transportation service performed partly within a foreign country, and hence no power to determine, for reparation or other purposes, when a joint through international rate or a combination of proportional rates for an international rail shipment—in either case a charge in-

[2] A proportional rate is a charge for the use of the railroad's lines in a continuous shipment in which other railroads also participate. A "local rate", in contrast, is a charge for a shipment between two points on one railroad's lines. See, *e.g.*, *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U.S. 573, 586–588.

volving foreign transportation—is unlawful. That we think is the plain meaning of Section 1(1) of the Interstate Commerce Act, and a result required as well by considerations of comity, equity, and practicality.

This is not to say that there is no remedy against excessive charges by American carriers who operate under through international rates. On the contrary, we are clear that a shipper is entitled to the protection of the Interstate Commerce Commission against any unreasonably high charge for the part of the international shipment that takes place within the United States, and we perceive neither practical nor theoretical impediment to the Commission's readily determining what portion of a joint through international rate (or, *a fortiori,* of a combination of proportional rates) is applicable to the American portion. Where the shipment moves under a combination of proportional rates, we believe the appropriate measure of reparations is the difference between the proportional rate actually charged by the American carrier and the maximum reasonable such rate as determined by the Commission. Under a joint through rate, the American carrier does not charge a separate rate for its part of the journey, but it receives an agreed-upon division of the proceeds of the joint rate, and we propose that the amount by which such division exceeds a charge computed on the basis of the maximum reasonable rate for the American leg of the trip, as found by the Commission, be deemed the measure of the shipper's damages.

The result, under our view, is that a shipper, in a proceeding before the Interstate Commerce Commis-

sion, may recover that portion of the allegedly excessive charge that is fairly attributable to the American carrier. Of course, the proportional rate charged, or division obtained, by the foreign carrier may also be excessive, under the standards applied by the appropriate foreign regulatory authority. But that is properly a matter between the shipper and the foreign carrier or authority, and not the concern of the Interstate Commerce Commission. To thus remit the shipper to his remedies under Canadian or Mexican law against the foreign carrier with respect to any allegedly excessive charge attributable to that carrier seems to us both the dictate of the territorial limitation in Section 1(1) of the Interstate Commerce Act, and a rational and practical allocation of responsibilities as between the regulatory authorities of friendly nations.

In the present case, the Commission awarded reparations on the basis of its determination of maximum reasonable joint through international rates for the shipments in question. In so doing the Commission exceeded, in our view, its territorial jurisdiction. The district court upheld the award. The court of appeals reversed, but on questionable premises. We believe that further proceedings before the Commission are necessary to determine under proper standards the correct amount of reparations due to petitioner. Accordingly, we urge that the judgment of the court of appeals be vacated and the case remanded for appropriate further proceedings.

224-443—66——3

I. THE EXPRESS STATUTORY LIMITATION OF THE INTERSTATE COMMERCE COMMISSION'S JURISDICTION TO TRANSPORTATION WITHIN THE UNITED STATES PRECLUDES AN AWARD OF REPARATIONS PREDICATED UPON A COMMISSION DETERMINATION OF THE MAXIMUM REASONABLE JOINT RATE (OR COMBINATION OF PROPORTIONAL RATES) FOR A RAIL SHIPMENT THAT TAKES PLACE IN PART OUTSIDE OF THE UNITED STATES

A. Section 1(1) of the Interstate Commerce Act, 49 U.S.C. 1(1), authorizes the Commission to enforce the Act's provisions with respect to common carriers engaged in transportation by rail from any place in the United States to a foreign country (or vice versa), "but only insofar as such transportation * * * takes place within the United States." The language is unequivocal and its meaning, we submit, plain: The Commission has regulatory authority over international shipments only with respect to the part of the shipment that occurs within the United States.[4] *E.g., United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 620–621; *St. Louis, B. & M. R. Co.* v. *Brownsville District*, 304 U.S. 295; *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, 660; *Hoffman-Taff, Inc.* v. *St. Louis-S. F.*

[4] The original Act did not contain the proviso quoted in the text. Act of Feb. 4, 1887, c. 104, §1, 24 Stat. 379. But, though the original Act was applicable to carriers engaged in rail transportation "from any place in the United States to an adjacent foreign country," it seems clear that extra-territorial application of the Act was not contemplated save in special instances which are not relevant here. See 17 Cong. Rec. 3723, 3725, 7281, 7286, 7753. The proviso was added by the Act of Feb. 28, 1920, c. 91, § 400, 41 Stat. 474, merely to clarify this understanding. See H. Rep. No. 456, 66th Cong., 1st Sess., p. 27; 59 Cong. Rec. 888–890.

Ry. Co., 279 I.C.C. 710; *Cosmopolitan Shipping Co.* v. *Hamburg-American Co.*, 13 I.C.C. 266.[5]

If, then, in a shipment from New York to Toronto over the connecting lines of an American and a Canadian carrier, the shipper ships goods from New York to the border on the American carrier, the goods are unloaded there and reloaded onto a Canadian carrier for the balance of the journey, and each carrier charges the shipper separately, the shipper surely cannot complain to the Interstate Commerce Commission that the rate charged by the Canadian carrier was unjust and unreasonable. For, to repeat, the Commission has been expressly denied by Congress the power to regulate transportation within Canada. We see no justification for a different result merely because the shipment travels in a continuous movement, without unloading and reloading at the border, from an American place of origin to a foreign destination, or vice versa.

Suppose that the American carrier charges a pro-

[5] *H. K. Porter Co.* v. *Central Vermont R. Co.*, 366 U.S. 272, is not opposed. There Canadian and American railroads established joint through rates on certain shipments from Canada to the United States that were lower than the rates available to other consignees of such shipments, and the Commission found that the higher rates were unjust and unreasonable, unduly prejudicial, and unduly preferential, and issued a cease and desist order, limited, however, to "transportation within the United States." This Court upheld the order. Since the order affected only the American part of the transportation, it had, as the Court emphasized, no extra-territorial effect. *United States* v. *Pacific & Arctic Co.*, 228 U.S. 87, held merely that a conspiracy involving foreign carriers to restrain trade within the United States was within the reach of the Sherman Act.

portional rate (see p. 11, n. 3, *supra*) for its part of the journey and the Canadian carrier a proportional rate for its part, and the charge paid by the shipper for the through shipment is thus the combination of these rates. A proportional rate contemplates that either the shipment's point of origin, or its destination, or both, is located on the connecting line of another carrier; such a rate does not cover a complete shipment but only a portion of a shipment. In this sense, the American carrier's proportional rate, in our example, is not a charge for a domestic shipment; it is part of a charge for an international shipment. But it is precisely the part of the charge that pertains to the American leg of the trip, just as the Canadian carrier's proportional rate is the part of the total charge that covers the Canadian part of the transportation service.

It follows that where an international shipment travels under a combination of proportional rates, the Commission's regulatory authority is limited to the American carrier's proportional rate and does not extend to the proportional rate charged by the foreign carrier for its portion of the trip. *Western Peat Co.* v. *Illinois Central R. Co.*, 297 I.C.C. 273, 275; *Elliott Packing Co.* v. *Duluth, W. & P. Ry.*, 292 I.C.C. 12; *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 I.C.C. 785. If the American proportional rate is unjust and unreasonable, the shipper is entitled to relief in a proceeding before the Interstate Commerce Commission. See *Dow Chemical Co.* v. *Alton & Southern R.R.*, 284 I.C.C. 365. But the Commission would appear to have no authority to inquire into the lawfulness of the foreign proportional rate.

The result should be the same when a joint through rate, rather than a combination of proportional rates, is applicable to the international shipment. The principal difference between the two kinds of charge is that one (the joint rate) is negotiated by the participating carriers and the other (the combination of rates) is the result of independent determination by the participants (see pp. 10–11, *supra*). That difference seems irrelevant here. In either case, it is a matter of several railroads fixing their charges with reference to points of origin or ultimate destination, or both, that lie beyond their own lines. In the case of a joint rate, each carrier receives a share—termed a "division"—of the proceeds. The divisions are, for present purposes, essentially equivalent to the proportional rates that go to make up a combination of proportional rates.[6] Like a combination of proportional rates, a joint through rate for an international shipment includes a charge for a transportation service provided by a foreign carrier in a foreign country—

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[6] See, further, pp. 29–30, *infra*. We know of no case where it has been held—or where it would be reasonable to hold—that a joint through rate established simply by adding up the proportional rates between the points in question exceeded the maximum reasonable joint rate over the same route between the same points, assuming that each such proportional was just and reasonable. Indeed, joint rates are often formed merely by adding up a series of proportional rates. See, *e.g.*, *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 231. Likewise, railroads offering a combination of proportional rates have latitude in fixing their respective proportionals comparable to that they enjoy in negotiating the divisions of a joint through rate. *Refund Provisions, Lake Cargo Coal*, 299 I.C. 659, 662.

that charge being the division exacted by the foreign carrier, which is comparable to the foreign carrier's proportional rate in the case of a combination of proportional rates. It seems inescapable, therefore, that for the Interstate Commerce Commission to determine a maximum joint through international rate, no less than for it to prescribe a foreign carrier's proportional or local rate, is a regulation of foreign transportation barred to the Commission by Section 1(1) of its organic act.

The Commission has recognized as much in its consistent position, reiterated in its opinion in the present case (R. 14), that it has no power to prescribe for the future (*i.e.*, directly compel a carrier to charge) reasonable joint through international rates. *E.g., Carey Mfg. Co.* v. *Grand Trunk W. Ry.*, 36 I.C.C. 203; *Carlowitz & Co.* v. *Canadian Pacific Ry.*, 46 I.C.C. 290; *American Cyanamid Co.* v. *Director General*, 69 I.C.C. 337; *Duplex Printing Co.* v. *British Columbia Elec. Ry.*, 128 I.C.C. 692; *Pittston Paper Corp.* v. *Canadian Natl. Ry.*, 165 I.C.C. 141, 144; *Great Northern Ry. Abandonment*, 202 I.C.C. 703, 707; *Chas. H. Lilly Co.* v. *Great Northern Ry.*, 298 I.C.C. 407, 410. See, also, p. 23, n. 10, *infra*. At the same time, the Commission holds that it may determine such rates for the purpose of adjudicating reparation claims of shippers who ship under joint through international rates. R. 16–17; see, *e.g., Buckerfield's Ltd.* v. *Atchison T. & S. F. Ry.*, 280 I.C.C. 15, 18; *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co.*, 279 I.C.C. 710, 712; *Ryegate Paper Co.* v. *Boston & Maine R.R.*, 87 I.C.C. 673. This difference in treatment, we believe, is without support

in the Act. Section 1(1) does not provide merely that the Commission shall not issue orders prescribing for the future rates applicable to foreign transportation. It provides that *none* of the provisions of the Act is applicable to foreign transportation.[7] That must include the sections (Sections 1(5) and 12(1)) that permit the Commission to make a determination of maximum reasonable rates for the purpose of awarding reparations to complaining shippers.

B. The Commission's position that for reparation purposes it may determine the reasonableness of a joint through international rate as a whole seems to us unsound in policy as well as contrary to the territorial limitation in Section 1(1) of the Interstate Commerce Act. *First,* the Commission would appear to be ill equipped to make determinations regarding the reasonableness of charges exacted by a foreign carrier for foreign rail transportation. The Commission claims no expertise with respect to the costs and other conditions of foreign rail transportation. Yet it assumed without any discussion in the instant case that Canadian railroad conditions are so akin to those in this country that a rate for a shipment having its origin in the United States and its destination in Canada that exceeds the maximum reasonable rate for the same kind of shipment over a comparable distance completely within the United States must be unreasonably high.

[7] For a limited exception to this principle; see n. 12, *infra*, p. 25.

Second, questions of expertise aside, it seems improper for the Commission, for any purpose, to judge the reasonableness of a foreign transportation charge in disregard of the legal standards administered by the foreign regulatory agency having authority over such charges. In the long run such a practice may produce unnecessary friction among the nations involved.

Third, the Commission's position may prove unfair both to shippers and to carriers. It is unfair to shippers because it may deny them the benefit of low Canadian and Mexican rates. Under the Commission's view, though the American carrier exacts a charge that is unlawfully high under the standards of the Interstate Commerce Act, the shipper is entitled to no reparations if the foreign charge is so low that the joint rate, considered as a whole, is reasonable under the standards of the Act. In such a case the shipper derives no benefit from the Canadian carrier's low charge,[8] and the American carrier obtains a windfall by being permitted to collect an excessive charge without any penalty.

The Commission's position may also result in unfairness to American carriers that participate in joint through international rates. They are made fully liable for any excess over the maximum reasonable joint rates as determined by the Commission, although

[8] That Canadian rates may indeed often be low by American standards is suggested by the fact that Canadian law makes no provision for minimum rate regulation of railroads. Canadian railroads may therefore be freer than American railroads to lower their rates for competitive or other reasons.

that excess may be due entirely to a Canadian or Mexican carrier whose practices are outside the control of the Interstate Commerce Commission. The American carriers, to be sure, need not participate in such rates; but the public is the poorer if this flexible and widely used technique of railroad rate-making is thereby discouraged (see p. 36 and n. 22, *infra*).

C. We are mindful that the Commission's position has support in decisions of this Court, the leading case being *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, decided in 1927 in an opinion by Mr. Justice Butler. There, a shipper complained to the Commission that a joint through international rate under which it had shipped commodities was unjust and unreasonable. The Commission agreed that the rate was too high, determined the maximum just and reasonable rate, and awarded the entire difference as reparations. This Court upheld the Commission's reparation order. The Court first noted that the carrier had published no rate to the border. This, the Court reasoned, was a violation of the Interstate Commerce Act, resulting in the shipper's being compelled to pay the joint through international rate; therefore the rate was subject to scrutiny under the standards of the Act.[9]

[9] This initial step causes great difficulty. We fully agree that if a shipper is charged a joint through international rate, that rate is subject to the Commission's jurisdiction at least to the extent of the American carrier's division of the proceeds of the rate. But we cannot accept the apparent implication of the Court's opinion that, had the American carrier also published a proportional rate to the border, it could thereby have escaped

The second—and critical—step in the Court's reasoning in *News Syndicate* was the assertion that, since the shipper was compelled (due to the absence of any other rate) to pay the joint through international rate, he was entitled to look to the American carrier for reparations if that rate was found to be excessive. We grant that insofar as the joint through international rate necessarily involves a

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all liability in respect of the joint rate. *First*, we find nothing in the Act that requires an American carrier to publish such a proportional rate, or prohibits it from entering, instead, into a joint rate. Therefore, we do not understand on what theory the Court predicated the Commission's power to scrutinize the joint through international rate in its entirety on the carrier's failure to publish a proportional rate. *Second*, even if the American carrier had published such a rate, it probably would still have been required by law to charge the joint rate. See *Hardy* v. *Galveston, H. & S.A. Ry. Co.*, 169 I.C.C. 790. It is well settled that the anti-discrimination provisions of the Act forbid a carrier to charge different rates on the same kind of shipment moving over the same route between the same points (*e.g.*, *B. & O. S.W. R.R. Co.* v. *Settle*, 260 U.S. 166, 172; *Pittsburgh etc. Ry. Co.* v. *Fink*, 250 U.S. 577, 581), and that—in the event such alternatives are offered—a joint rate takes precedence over a combination of proportionals and so is the only lawful rate as between shipper and carrier. *E.g.*, *Larabee Flour Mills Corp.* v. *Atchison, T. & S. F. Ry.*, 168 I.C.C. 335, 339. *Third*, we see no reason to exonerate a carrier of all liability in respect of a joint through international rate merely because it offers an alternative rate as well. We believe that the Act entitles shippers to pay no more than the maximum reasonable charge, as determined by the Interstate Commerce Commission, for transportation within the United States—no matter in what form that charge is levied. (See 49 U.S.C. 1(5)).

Notwithstanding *News Syndicate*, the Commission has taken the position that an American carrier may not limit its liability under a joint through international rate by also offering a reasonable proportional rate (see n. 20, p. 35, *infra*); we think this is sound.

charge for the American leg of the trip, the shipper is entitled to relief if that charge is unjust and unreasonable. Obviously, though, such a rate also includes a charge for a foreign transportation service, and for the Commission to determine whether the entire rate is just and reasonable thus involves the Commission in passing judgment on a charge exacted by a foreign carrier for transportation in a foreign country.

The Court found justification for this anomalous result [16] in the doctrine of joint tortfeasors' liability. In *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, the Court had held that a shipper injured by having to pay an unreasonably high joint rate could obtain full reparations in a suit against any one of the participating carriers, they being (in this respect at least) joint tortfeasors. The Court in *News Syndicate* relied on this reasoning. But *Sloss Sheffield* had involved a domestic—not an international—joint rate. The difference is critical. The Commission has unquestioned jurisdiction to pass upon the lawfulness of a domestic joint rate in its entirety; and, if such a rate is found to be lawful, it makes good practical and legal sense to hold each carrier fully liable for the excessive charge, rather than compel the shipper to sue the several participants. But this assumes, of course, that the joint

[16] It seems particularly anomalous in light of the Court's later holding, in *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, 660, that the "Act does not empower the Commission to prescribe or regulate" joint through international rates. See p. 13, *supra*.

rate is, in fact, unlawful. Otherwise, there would be no occasion to apply the joint-tortfeasor doctrine; there would be no tort. We believe it improper to so assume in the case of a joint through *international* rate, where a key component of the charge—namely, the division exacted by the foreign carrier—is wholly outside the Commission's jurisdiction, and where the very question is the Commission's power to determine the lawfulness of the entire rate.

Not only have we no quarrel with the reasoning or result in *Sloss-Sheffield;* we would agree with *News Syndicate* that, in the case of a joint through international rate, too, since the American carrier and the foreign carrier have agreed among themselves on a single rate for the entire international journey, they should be deemed jointly liable if the rate is excessive. So much, surely, is unexceptionable—but it merely poses, rather than answers, the essential question whether and in what sense such a rate is excessive.

An example will illustrate. Suppose that a joint rate between New York and Toronto was arrived at by the participating carriers in the following manner. The American carrier, properly applying the standards of the Interstate Commerce Act, correctly determined what it might lawfully charge as a proportional rate between New York and the point at which the shipment to Toronto would cross the border; the Canadian carrier, properly applying Canadian legal standards [11]—which, let us hypothesize, are interpreted

[11] Chapter 234, § 328(1) of the Revised Statutes of Canada, 1952, Vol. IV, provides that the Canadian Board of Transportation "may disallow any tariff or any portion thereof that it con-

by the Canadian Board of Transportation to authorize higher rates than the Interstate Commerce Commission would deem just and reasonable—determined the charge that would be just and reasonable for its portion of the journey; and the joint through international rate was simply the sum of these two amounts (divisions). In such a case, the Commission, under the rule of *News Syndicate,* would apply the standards of the Interstate Commerce Act and find the rate as a whole unjustly and unreasonably high, even though the American and the foreign carrier had each determined its part of the rate by correctly applying the legal standards of the country having jurisdiction of its portion of the trip. In these circumstances, surely, to label the American and Canadian carriers "joint tortfeasors" because the rate as a whole is unjust and unreasonable under American standards, and to compel the American carrier to pay the entire difference between the rate actually charged and the Commission's conception of a maximum reasonable rate, is both unfair to the carriers and manifestly opposed to the letter and spirit of Section 1(1) of the Interstate Commerce Act, which requires the Commission to confine its regulatory activities to the United States.[12]

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siders to be unjust and unreasonable, or contrary to any provisions of this Act * * *."

[12] We point out that where Congress has desired to make American carriers liable in respect of the portion of a through transportation service taking place outside the United States, it has done so expressly. See Section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11).

We believe, in short, that the Commission has no power to pass upon the lawfulness of a joint through international rate. As next we show, that does not mean that one who ships under such a rate has no remedy if the American carrier employs the joint through rate device to overcharge the shipper, in violation of American standards of a just and reasonable rate, for the part of the trip that takes place on the American side of the border.[13]

II. THE PROPER MEASURE OF DAMAGES DUE BY THE DOMESTIC CARRIER ON A JOINT THROUGH INTERNATIONAL SHIPMENT IS THE AMOUNT BY WHICH THE DIVISION OF THE JOINT RATE ACTUALLY RECEIVED BY THE AMERICAN CARRIER EXCEEDS THE MAXIMUM REASONABLE RATE FOR THE AMERICAN LEG OF THE TRIP, AS DETERMINED BY THE COMMISSION

A. If we are correct in our suggestion that the Commission has no authority to determine maximum reasonable rates for an international through ship-

[13] *News Syndicate*, to our knowledge, has been followed in only one later decision of this Court, *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, though *Great Northern Ry.* v. *Sullivan*, 294 U.S. 458 (discussed *infra*, pp. 27–29), applied a similar principle in a related context. In *Lewis-Simas-Jones*, involving a joint through international rate from a point in Mexico to a point in the United States, the American carrier had published a rate from the border, but it was only a local rate, which contemplated that the shipment would originate at the border rather than in Mexico—a rate, in short, applicable to local, not through, service. Since it had published no proportional rate applicable to its portion of the international through shipment, the carrier had in the Court's view violated the Interstate Commerce Act, thereby empowering the Commission to scrutinize in its entirety the joint through international rate that the shipper had been compelled to pay (283 U.S. at 663).

ment, it does not follow that a shipper is remediless where the American carrier's charge for the American leg of the trip is excessive. There should be no problem where the shipment travels under a combination of proportional rates. If the shipper believes that the American carrier's proportional rate is unlawful under the standards of the Interstate Commerce Act, he should file a complaint with the Interstate Commerce Commission; the Commission has full power both to prescribe for the future the maximum reasonable proportional rate, and to award the shipper reparations for past injury if he was compelled to pay a rate in excess of what the Commission determines was the maximum reasonable rate. If the shipper believes that the Canadian carrier has charged a proportional rate for the Canadian leg of the trip that is excessive under Canadian standards, the appropriate remedy is an action against the Canadian carrier under the pertinent laws of Canada.[14] This is an especially appropriate solution in a case like the present, where the shipper is itself a corporation chartered by and doing its principal business in the foreign country in question. But, in any event, we think Section 1(1) establishes that the Interstate Commerce Commission has no jurisdiction over Canadian or Mexican rail rates.

This approach was disapproved—we think erroneously—in *Great Northern Ry.* v. *Sullivan*, 294 U.S. 458, which involved rail traffic between Canada and

[14] See *British American Oil Co.* v. *Grand Trunk Ry. Co.*, 9 Can. Ry. Cas. 178; *British American Oil Co.* v. *Canadian Pacific Ry.*, 12 Can. Ry. Cas. 327.

the United States that moved under a combination of Canadian and American proportional rates. The shipper brought a proceeding before the Interstate Commerce Commission charging that the American proportional rate was unjustly and unreasonably high. He did not allege, however, that either the Canadian proportional rate, or the combination of proportional rates—the total charge that he paid for the shipment—was unjust and unreasonable, and this Court held that consequently he could recover no damages even if the American proportional rate was indeed unreasonable. In the Court's view, while the Commission could prescribe a maximum reasonable proportional rate for the future, the shipper had not proved any injury entitling him to reparations, because he had failed to challenge the combination of rates as a whole. Conceivably, the excessive charge for the American leg of the trip might have been completely offset by an unreasonably low charge for the Canadian leg.

An example will indicate our difficulty with this reasoning. Suppose the American proportional rate was unjustly and unreasonably high by the standards of the Interstate Commerce Act, and the Canadian proportional rate unjustly and unreasonably high by Canadian regulatory standards. Under the rule in *Sullivan,* the shipper would still have to prove that the combination of rates as a whole was unreasonably high by American standards, and, if he failed in this proof, he would be entitled to no damages, even though the Canadian and the American carriers each exacted an illegal charge from him. This anomaly is simply

the converse of that produced by the Court's reasoning in *News Syndicate* [15]—that a shipper may be entitled to reparations with respect to an international through shipment even though the respective charges levied by the American and the foreign carrier are perfectly lawful under the regulatory standards of their respective countries (see pp. 24–25, *supra*). Both situations exemplify the inappropriateness of the Commission's basing an award of reparations upon the application of American standards of just and reasonable rates to all segments of an international rail shipment.

B. Where such a shipment travels under a combination of rates, the portion of the total charge that relates to the American leg of the trip can be readily determined; it is simply the proportional rate charged by the American carrier. We submit that there is no materially greater difficulty in determining the proper allocation of the charge for an international rail service where the carriers offer a joint rate rather than a combination of rates. Although a joint rate is a single undivided charge for the through shipment, the proceeds are divided among the participating carriers, and their shares (divisions) are essentially equivalent to the proportional rates in a combination of rates. As the Court observed in *Sullivan,* "[t]he

[15] The *Sullivan* opinion relies heavily on *News Syndicate. Sullivan* involves the additional anomaly that if the Canadian proportional is so low as to make the combination reasonable by American standards, the result is that the low Canadian rate inures to the benefit of the American carrier, not the shipper; it is a shield which protects the American carrier from liability for having charged an unreasonably high rate.

proportionals here involved are but parts of a through rate and cannot be distinguished from divisions of a joint rate." 294 U.S. at 463, citing *Morrell & Company* v. *New York Central R. Co.*, 104 I.C.C. 104, 128. See, also, *Through Routes and Through Rates*, 12 I.C.C. 163, 166; and pp. 10, 11, 17, *supra*.

Accordingly, where a shipper complains that he has been charged an excessive joint rate for a through international shipment, we think he must prove, not that the entire rate is unjust and unreasonable by the standards of the Interstate Commerce Act, but that the division received by the American carrier—the charge for the American leg of the trip [16]—exceeds the maximum reasonable proportional rate for that leg. See 44 Harv. L. Rev. 300–301. In other words, assuming that the sum of the divisions of a joint rate may be roughly equated with the sum of the proportional rates in a combination of proportional rates, we propose a similar test of liability for both types of international through charge.[17]

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[16] In an unusual case, perhaps, the division might not be fairly representative of the American carrier's charge for its portion of the through shipment under the joint rate. We would recognize discretion in the Commission to make appropriate adjustments in such cases.

[17] Under such a test, it is necessary that shippers enjoy ready access to American carriers' divisions of joint through international rates. If a shipper cannot discover what the American carrier's division is, he cannot know whether he may be paying an excessive charge. Failing other methods, the Commission could doubtless require that such divisions be published. See 49 U.S.C. 6(5)–(6); *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, 660 n.

Some language in *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, gives trouble here. In that case, a domestic joint through rate had been constructed by combining the existing proportional rates between the points in question (269 U.S. at 231), and a shipper brought an action against one of the participating carriers charging that the joint rate was unjust and unreasonable and seeking full reparations from that carrier. The carrier argued that it was liable for only so much of the excessive charge as it had received under its divisions agreement with the other participating carriers. The court rejected the argument, stating (269 U.S. at 234):

> The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole. It may be unreasonable although each of the factors of which it is constructed was reasonable. It may be reasonable although some of the factors, or the divisions of the participants, were unreasonable. * * *

We think this language must be viewed in its context—a joint through rate which, because it involved a trip wholly within the United States, was fully subject to the regulatory jurisdiction of the Interstate Commerce Commission. If a shipper has been forced to pay a joint through rate that the Commission properly determines to have been unjustly and unreasonably high, of course he has been injured in the entire amount that the joint through rate exceeds the maximum reasonable rate. As noted earlier (p.

23, *supra*), it is entirely reasonable in such a case that the shipper have an expeditious remedy for the entire excessive charge against any of the participating carriers. But, as we have been at pains to emphasize, it is misleading to speak of a joint through rate pertaining to an *international* rail shipment as being unjust and unreasonable under the Interstate Commerce Act, since at least one of the carriers participating in the rate is not subject to the Act with respect to its portion of the trip, but subject, rather, to a foreign regulatory authority applying its own standards of rate-making. Unless both the American and foreign carrier, in setting the rate, demanded and obtained divisions in excess of reasonable compensation under the regulatory standards of their respective jurisdictions for the portion of the through service rendered by each, the joint rate as a whole cannot be regarded as excessive or unlawful.

In such a case it must be viewed as a combination of charges and its lawfulness made to turn upon the lawfulness of each component charge. If the American carrier demanded and received a division in excess of the maximum reasonable proportional rate that it could have charged, under a combination of proportional rates, for its part of the same shipment, it has committed a wrong under American regulatory standards and the shipper is entitled to redress. That wrong is neither diminished nor enlarged by

what the Canadian carrier charges.[18] If the Canadian carrier has exacted a division that, under Canadian standards, exceeds the maximum reasonable proportional rate for the Canadian leg of the journey, it likewise has wronged the shipper and the shipper has remedies under Canadian law.

III. APPLICATION OF THE FOREGOING PRINCIPLES TO THE FACTS OF THIS CASE REQUIRES A REVERSAL OF THE COURT OF APPEALS' JUDGMENT AND FURTHER PROCEEDINGS BY THE COMMISSION

In the present case, the Commission, for the purpose of determining the liability of the respondent railroads to the petitioner shipper, undertook to determine maximum reasonable rates for shipments of potash between places in New Mexico and places in Canada. We believe this was improper. The Commission should have determined the maximum reasonable proportional rates for the American portions of these shipments, and awarded the shipper the difference between a charge so computed and the divisions (if greater) received by the railroads from the joint through rates under which the shipments in question moved. The respondents in this case, apparently, have assumed that this is precisely what the Commission did in the *Consolidated Rendering* proceeding, which involved rates for similar shipments from the

[18] Thus, if the Canadian carrier's division constitutes a very low charge by American standards for the Canadian part of the journey, that should in no way reduce the shipper's recovery in an action against the American carrier. He is entitled to the full benefit of the low Canadian charge.

identical places in New Mexico to the border points—Detroit, Port Huron and elsewhere—at which Canada Packers' shipments crossed *en route* to their Canadian destinations (Statement, *supra,* pp. 6–8). Thus, it appears, in computing the damages that they owed Canada Packers, respondents simply subtracted the charges deemed reasonable maxima in *Consolidated Rendering* from the divisions they actually received on Canada Packers' shipments.

It is not entirely clear, however, that the *Consolidated Rendering* proceeding involved proportional rates, and thus fairly determined the reasonable charge for the American leg of a trip whose destination was not a place on the border but places within Canada—for a through not a local service (see n. 3, p. 11, *supra*).[18] We believe, therefore, that the judgment of the court of appeals should be vacated, and the case returned to the district court to be held there while the shipper seeks clarification of this issue from the Commission. Should it turn out that the *Consolidated Rendering* decision did determine the maximum reasonable rates for the American segment of the through shipments in question, and that respondents properly subtracted the amounts they could have

[18] We point out that in some cases—for example, where through service is relatively infrequent—a railroad may be permitted to charge a local rate for its portion of the through service rather than required to publish a proportional rate. Thus, even if *Consolidated Rendering* determined local rather than proportional rates to the border, it is possible that the Commission would regard them as a reasonable charge for the American portion of the international through shipments involved here. That, of course, is a matter for the Commission to determine on remand.

charged under those rates from the divisions that they in fact received on the shipments which traveled under the joint rates, the district court should enter judgment for respondents. If it turns out that *Consolidated Rendering* involved local rates not appropriate for a through service of this nature, the Commission should on remand proceed to determine the maximum reasonable American proportional rates for the shipments in question, and award the shipper as reparations the difference between those maximum rates and the divisions received by the defendant carriers, assuming the divisions are larger.[20]

We recognize the heavy burden that rests upon us in arguing that a decision of this Court[21] should be re-examined and its principles substantially modified. We believe, however, that such a re-examination is warranted in the present circumstances. The legal considerations that we have canvassed in this brief argue decisively, we submit, against the course adopted by the Commission in this area. There are also impressive practical and equitable considerations—and considerations of comity among friendly nations as well—which argue for the result we urge. A determination that a joint through international rate or a combination of proportional rates for a through international shipment is unlawful requires

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[20] We regard as irrelevant, as did the Commission, the fact that at the time of the shipments in question respondents maintained rates to the border, even assuming they were proportional rates (see n. 9, pp. 21–22, *supra*).

[21] *News Syndicate*. *Lewis-Simas-Jones* and *Sullivan*, which apply the same or similar principles, we regard as substantially derivative from *News Syndicate*.

the Interstate Commerce Commission to make a legal determination with respect to a transportation service provided by a foreign carrier in a foreign country. We do not believe that the Commission's knowledge and experience in railroad matters extends to foreign rail service, and we do not believe that it is seemly for the Commission to intervene in this fashion in the internal affairs of a friendly nation.

The scheme of reparations that we propose as consistent with—indeed as compelled by—the language and purpose of Section 1(1) of the Interstate Commerce Act will in some cases, perhaps, afford shippers a smaller recovery; in others a larger recovery will be possible. In all cases the shipper's burden of proving unreasonableness with respect to the foreign leg of the international trip will be eliminated. Our proposal will also, we believe, facilitate international rail commerce, by freeing American carriers from liability in respect of charges by foreign carriers over which they have no control,[22] as well as dispel the confusion and inconsistencies that have resulted from prior decisions in this field and have come to the fore in the present case.

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[22] Under the *News Syndicate* rule as interpreted by the Commission, an American carrier may limit its liability only by declining to enter into a joint through international rate and publishing, instead, a proportional rate to (and from) the border. *E.g.*, *Buckerfield's* v. *Atchison, T. & S. F. Ry.*, 280 I.C.C. 15, 18; *E. J. Stanton & Son* v. *Atchison, T. & S. F. Ry.*, 258 I.C.C. 315, 317. We do not think it sound public policy thus to deter the use of the flexible joint rate technique. See *Lewis-Simas-Jones*, 283 U.S. 654, 660 n.

CONCLUSION

For the foregoing reasons, we submit that the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
RICHARD A. POSNER,
Assistant to the Solicitor General.
ROBERT B. HUMMEL,
JOHN T. MARSHALL,
Attorneys.

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No. 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CANADA PACKERS, LIMITED, PETITIONER

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR CANADA PACKERS, LIMITED

CHARLES B. MYERS
611 Field Building
Chicago, Illinois 60603
Attorney for Petitioner

Due: September 9, 1966

McCORMICK & HENDERSON, INC., CHICAGO

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Foreword

In response to the Court's invitation in its order of October 11,.1965, the Solicitor General submitted a memorandum herein, stating the views of the United States, as *amicus curiae*. The memorandum, filed in December 1965, included a separate statement of the views of the Interstate Commerce Commission.

On July 26, 1966, the United States filed a brief stating that upon further study and reflection, the Solicitor General concluded that while the general approach outlined in that memorandum was sound, the specific method suggested for computing reparations in cases involving joint through international rates was unnecessarily cumbersome, and in some respects erroneous. This latest approach by the government advocates sweeping changes in the controlling case law as administered by the Interstate Commerce Commission since 1910, and would require, as the Solicitor General puts it, "the substantial modification" of this Court's decisions in *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654, and *Great Northern Ry.* v. *Sullivan*, 294 U.S. 458.

The arguments of the Solicitor General in support of the government's position are so varied and complex that petitioner believes they should not be answered in this brief on the merits. The question raised by the lower court's decision is a narrow one and orderly procedure would seem to require that petitioner deal first with that subject and then file a separate brief in response to the government. Accordingly, this brief is confined to the matters involved in the lower court's decision. Petitioner will file as soon as practicable a brief in opposition to the views of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 36-40) is reported at 342 F. 2d 563. The findings of fact and conclusions of law of the United States District Court for the Northern District of Illinois, Eastern Division (R. 33-34) are not reported. The decision of the Interstate

Commerce Commission, Division 2 (R. 9-17) is reported at 313 I.C.C. 759; its reparation order of August 28, 1962 (R. 19-21) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 2, 1965 (R. 41). A timely filed petition for rehearing was denied on April 16, 1965 (R. 42).

The petition for a writ of certiorari was filed July 14, 1965, and was granted February 21, 1966 (R. 43, 383 U.S. 906). The jurisdiction of this Court rests on 28 U.S. Code § 1254(1).

QUESTION PRESENTED

The American railroad respondents joined with Canadian railroads in the establishment of joint through international rates which were applicable to and were assessed on petitioner's shipments from origins in New Mexico to destinations in Canada. Upon complaint by petitioner, the Interstate Commerce Commission found that the assailed joint rates exceeded maximum reasonable rates and awarded reparation to petitioner in the amount of the excess charges, including the proportion attributable to transportation in Canada. In an earlier proceeding, the Commission had found that the rates maintained by the American railroads from these same origins to various destinations in the United States, including the border points through which petitioner's shipments moved into Canada, were unreasonably high, determined the maximum reasonable rates and awarded reparation to complaining shippers for the difference.

The question presented is:

Did the Commission exceed its jurisdiction in awarding reparation to petitioner in the full amount of the excess charges assessed on its international shipments, including that proportion of the charges attributable to transportation in Canada or should the award have been limited by the difference between the unlawfully high rates to the border points and the maximum reasonable rates to such points?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act here involved are Sections 1, 6, 8 and 16, 24 Stat. 379 *et seq.*, as amended; 49 U. S. Code §§ 1, 6, 8 and 16, and are reproduced in the Appendix hereto.

STATEMENT

Proceedings before the Commission

Canada Packers is a Canadian corporation with principal place of business at Toronto, Ontario. It is engaged, among other things, in the manufacture of fertilizer at plants located in the provinces of New Brunswick, Ontario and Quebec, Canada (R. 25).

In July, 1947, the railroad respondents and substantially all other railroads in the United States, petitioned the Commission for an increase in their rates and charges on interstate and foreign commerce. In that proceeding, styled as *Ex Parte 166,* the Commission initially authorized a temporary increase of ten per cent effective October 13, 1947. That increase was superseded by an interim increase of twenty per cent effective January 5, 1948. In its final report in *Ex Parte 166,* the Commission authorized per-

manent increases, ranging from twenty to thirty per cent, subject to maximum increases on certain commodities, including a maximum increase on potash of $1.60 per ton. This maximum increase became effective May 6, 1948 (R. 25, 26).

In 1950, petitioner filed an informal complaint with the Commission alleging that the joint through international rates[1] charged by the American railroad respondents and their connecting Canadian carriers for the through transportation of 31 carload shipments of potash from Carlsbad and Loving, New Mexico,[2] to petitioner's plants at Toronto and Welland, Ontario; Montreal Quebec; and St. John, New Brunswick, Canada, during the period of the temporary increase, January 5, 1948, through May 5, 1948, were unjust and unreasonable, and reparation was sought. All of the shipments in question crossed the international border at Detroit or at Port Huron, Michigan (R. 26, 27).

Action on the informal complaint was deferred, awaiting decisions in similar cases then pending before the Commission, including *Consolidated Rendering Co.* v. *Atchison, T. & S. F. Ry. Co.*, 287 I.C.C. 673, 300 I.C.C. 87, which involved the same issue raised by petitioner—that the existing basic rates (on a number of commodities, including potash) as increased by the temporary percentage increases in effect

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[1] Rates hereinafter referred to are per net ton, unless otherwise indicated.

[2] The complaint before the Commission also involved shipments from Trona, California. Petitioner has received full reparation on these shipments, and they are not in issue here.

from January 5 through May 5, 1948, were unreasonable to the extent they exceeded basic rates plus the lower permanent maximum increases prescribed by the Commission in its final report in *Ex Parte* 166. (R. 8, 10, 11).

On March 18, 1957, the Commission handed down its decision in *Consolidated Rendering, infra,* holding that, during the period in question, the rates on potash (plus the temporary increases) from Carlsbad and Loving, New Mexico, to Port Huron and Detroit, Michigan, and certain other destinations, were unreasonable to the extent they exceeded the basic rates plus the permanent maximum increases found by the Commission to be reasonable (R. 15).

When the railroads refused to satisfy petitioner's informal complaint on the same relative basis, petitioner timely filed a formal complaint (R. 6-9). The evidence shows that prior to 1944, respondents had maintained a close relationship between the American rates and Canadian rates for comparable distances. The rates to Toronto and Welland were the same as to Buffalo. Montreal was 40 cents per ton higher than New York and St. John was 40 cents lower than Caribou, Maine. In cases decided in 1944 and 1946, the Commission found the rates to the American destinations unreasonably high and required reductions of 50 cents in the Buffalo rate, $1.40 in the rate to New York and $1.90 in the rate to Caribou. The respondents did not make any reductions in the rates to Toronto, Welland and St. John (R. 15, 16, 28, 29).

In its report of March 24, 1961, the Commission, Division 2, in *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.,* 313 I.C.C. 759, held that the joint through international rates assessed on petitioner's shipments were unjust and unreasonable. The record shows that the rates

to the American destinations and those to the Canadian destinations in question were as follows[3]:

From Carlsbad, N. Mex., to—	Distance (miles)	Rates[1] assailed	Reparation rates[2]	Difference
Detroit, Mich.	1,515	$13.32	$12.70	$ .62
Buffalo, N. Y.	1,747	14.04	13.30	.74
Welland, Ont.	1,728	14.64	13.80	.84
Toronto, Ont.	1,741	14.64	13.80	.84
New York, N. Y.	2,100	15.12	14.20	.92
Montreal, Que.	2,075	17.28	16.00	1.28
Vanceboro, Maine	2,461	17.28	16.00	1.28
St. John, N. B.	2,551	20.40	18.60	1.80
Caribou, Maine	2,589	18.60	17.10	1.50

[1] Basic rates plus the 20 percent interim increase authorized in Ex Parte No. 166.

[2] Rates incorporating the final increase authorized in Ex Parte No. 166, on which basis reparation was awarded in the *Consolidated Rendering* case and *Canada Packers* case.

The Commission concluded that Canada Packers was entitled to reparation in the amount of the difference between the charges collected and those which would have accrued at the lower rates found to be just and reasonable. In so holding, the Commission stated that the law was well settled that railroads within this country have the alternative of publishing reasonable and otherwise lawful rates applicable to or from the border (which respondents had not done) in which event they would be answerable only for those rates, or they could participate in joint through international rates (as respondents had done) and become jointly or severally liable for any unlawfulness found in such rates (R. 16, 17). Among the cases relied

[3] Based on Table II of Commission's report herein (R. 15) and its findings as to maximum reasonable rates to the Canadian destinations here involved (R. 17).

upon by the Commission were *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179; and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654 (R. 17).

The Commission rejected respondents' argument that the amount of reparation could not exceed the award made in *Consolidated Rendering* to Port Huron and Detroit, the border points at which petitioner's shipments crossed into Canada (R. 16, 17). A petition for reconsideration was denied on October 9, 1961 (R. 18).

By order dated August 28, 1962, the Commission directed the respondents and certain Canadian railroads to pay petitioner specific amounts of reparation, with interest, "insofar as the transportation took place over their lines in the United States." (R. 19-21). Respondents refused to pay reparation in the amount awarded but paid to petitioner an amount computed as if petitioner's shipments had terminated at Detroit and Port Huron[4] (R. 31, 32).

Proceedings in the lower Courts

Petitioner filed suit in the District Court[5] under Section 16(2) of the Interstate Commerce Act, 49 U.S. Code § 16(2), to recover from respondents the unpaid balance of $1,390.55 plus interest and a reasonable attorney's fee.

The District Court, following the principles of the *News Syndicate* and *Lewis* cases, concluded that the respondents had failed to establish lawful rates applicable to the border

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[4] The Commission ordered payment of $6,694.56, plus interest, on the shipments in question. Respondents paid $5,304.01, plus interest, leaving an unpaid balance of $1,390.55, excluding interest. (R. 32).

[5] The American railroads which are respondents here were the only parties against which suit was brought.

points, that such failure violated the Act, that the joint through international rates assessed on petitioner's shipments were the applicable rates, that the Commission had jurisdiction to determine petitioner's damages, if any, that the assessment and collection of the charges found unreasonable by the Commission was a tort for which the respondent railroads were jointly and severally liable without regard to the proportion of charges attributable to the transportation in the foreign country and that the Commission's findings were supported by the evidence. Judgment was entered for petitioner as prayed (R. 33, 34). The railroads appealed from that judgment (R. 35).

The Court of Appeals reversed the District Court and concluded, contrary to petitioner's contentions, that this case was not governed by *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654. In discussing the *Lewis* and *News Syndicate* cases, the lower court referred to this Court's observations that the railroads had not established rates which applied between the boundary and the American origin or destination. The Court of Appeals then concluded that the respondents in this proceeding had met the burden of proving rates from the New Mexico origins to the border points, that those rates must be considered as a maximum guide in awarding damages to petitioner, and that any other conclusion would require the respondent railroads to pay reparation to a Canadian consignee on account of freight charges received for transportation performed within Canada by Canadian railroads not parties to the case. It found such a result prohibited by the territorial limitation provisions of Section 1 of the Interstate Commerce Act (R. 39, 40).

SUMMARY OF ARGUMENT

The Interstate Commerce Act applies to common carrier railroads engaged in foreign commerce and to the transportation they render from points in the United States to a foreign country, but only in so far as the transportation takes place within the United States.

Under the Act, the carriers are required to establish and maintain rates applicable to any service performed thereunder and are subject to the further requirement that such rates must be just and reasonable. Every unjust and unreasonable rate is prohibited and declared unlawful. The statute makes railroads liable to any person who suffers damages resulting from a carrier's act or failure to act in violation thereof. The Commission has the duty to determine whether the railroads have violated the Act and, if so, to enter an order in favor of the injured party and against the railroads for the amount of such damages. If a railroad refuses to comply with a Commission order for money damages, the injured party is authorized to bring an action in the district court of the United States or in a state court of general jurisdiction to enforce such order.

Acting within this statutory framework, the Commission has consistently held, since 1910, that American railroads participating in international traffic have a clear alternative of either establishing lawful rates applicable between points in the United States and the international boundary, in which event they are answerable only for those rates or they may participate in joint through international rates covering the entire transportation and become jointly and severally liable for any unlawfulness found in such rates. This long established principle

of law is confirmed by the decisions in *News Syndicate Co.* v. *New York C.R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654.

The joint through international rates assessed on petitioner's shipments took precedence over all other rates, including those published from the New Mexico origins to the border points of Detroit and Port Huron, Michigan. In participating in these through rates, the respondents necessarily failed to establish lawful rates applicable on petitioner's traffic from points in the United States to the boundary as required by the Act. The Court of Appeals failed to understand that, as a matter of law, there can be only one rate applicable on a given shipment and that it applies to the exclusion of every other rate. This misunderstanding apparently was the primary reason the lower court found the decisions in *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 684 were not controlling in this case. Contrary to these decisions, the lower court would (erroneously) limit petitioner's damages by the rates to the border points on the ground that any additional amount would force defendants to pay damages on account of transportation performed in a foreign country. This Court, in the cases just cited, held that (1) the American railroads were liable for the full damages on the premise they were joint tort feasors with their connecting carriers and that they were jointly and severally liable for all the damage sustained by the shipper and (2) the Canadian carriers were not necessary parties to the suit.

The Court of Appeals misconstrued the decisions in *News Syndicate* and *Lewis* and its judgment should be reversed. Those cases, petitioner submits, control this one.

ARGUMENT

I.

The Interstate Commerce Commission had jurisdiction to determine whether the joint through international rates were excessive and, if so, to ascertain the amount of petitioner's damages.

The statutory provisions involved in this proceeding are Sections 1, 6, 8 and 16 of the Interstate Commerce Act, 49 U. S. Code §§ 1, 6, 8, and 16.

Section 1(1)(a) and (2) provide, *inter alia,* that the Act applies to common carrier railroads and the transportation which they render from any place in the United States to a foreign country, "but only in so far as such transportation takes place within the United States."

Subsection (5) of Section 1 provides, that all charges made for any service rendered in the transportation of property as aforesaid, shall be just and reasonable, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Section 6(1) and (7) require, in substance, that every common carrier shall establish rates for transportation rendered under the Act and that no carrier shall charge, demand, collect or receive a greater or less or different compensation than the rates specified in the tariff filed and in effect at the time of such transportation.

Section 8 makes carriers liable to any person injured as a result of the carrier's act or failure to act in violation of the provisions of the Interstate Commerce Act.

Section 16(1) authorizes the Commission, after hearing, to determine whether any party is entitled to an award of

damages for a carrier's violation of the Act and, if so, to enter an order directing the carrier to pay the sum determined by the Commission. Subsection 2 of Section 16 authorizes the institution of a complaint in the district court of the United States or in any state court of general jurisdiction if the carrier does not comply with an order of the Commission for the payment of money damages.

The question raised by this proceeding is the extent of the Interstate Commerce Commission's jurisdiction to award reparation in cases involving excessive joint through international rates. The issue is not novel or new and was resolved by the Court in its 1927 decision in *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, where the Court had before it certain questions certified to it by the Circuit Court of Appeals as to the jurisdiction of the Commission. The case involved the validity of a Commission order directing American railroads to pay reparation, which included the portion of excess charges attributable to transportation within Canada, based on a finding that the joint through international rate from Thorold, Canada to New York city was unreasonably high.

The first question asked by the lower court was whether the Commission had jurisdiction to determine the reasonableness of the joint through rate. This Court concluded that the Commission had such jurisdiction. As to the territorial reach of Section 1(1) and (2),[6] the Court said, at

[6] The case arose after Section 1 had been amended by the Act of February 28, 1920, 41 Stat. 474, which added the phrase, "but only in so far as such transportation * * * takes place within the United States." The amendment also added Subsection (2), which regulates the transportation of property within the United States and from the United States to a foreign country, but subject to the same proviso. As here pertinent, Section 1(1) and (2) have not been changed since the 1920 amendment.

pages 186 and 187 of 275 U.S.: "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. § 1(1) and (2)." Further, "It was the duty of defendants in error to establish just and reasonable rates for that service. § 1(5); § 6(1) and (7). They failed to make or publish any rate applicable to that part of the transportation."[7]

The railroad's failure to establish rates covering the transportation from the international boundary, in the Court's opinion, contravened the provisions of the Act and compelled the shipper to pay the excessive through charges. After observing that Section 8 of the Act made the railroads liable for damages sustained as a result of such failure the Court concluded that the Commission had jurisdiction to determine whether the shipper was entitled to an "'award of damages under the provisions of this Act for a violation thereof.' § 16(1)." The Court then held it was the duty of the Commission to ascertain the damages sustained and that in the ascertainment of damages it was obvious that the Commission had jurisdiction to determine the reasonableness of the charges exacted (275 U.S. 179 187).

The principles set forth in *News Syndicate* confirmed the Commission's view, first expressed in 1910, in *Black Horse Tobacco Co.* v. *Illinois Central R. Co.*, 17 I.C.C. 588, that the United States lines have an alternative with respect to their participation in international traffic—they

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[7] As shown under subject II of this argument section, respondents likewise failed to publish any rate applicable to the American portion of the transportation here in question.

may publish reasonable and otherwise lawful rates to and from the international boundary and stand answerable only for those rates or they may participate in joint through rates covering the entire transportation and become jointly and severally liable for any unlawfulness in such rates. This is still the Commission's position (R. 16, 17; Footnote 3, pages 14 and 15 of Memorandum filed herein by the United States, as *amicus curiae*). See also *Citizens Gas & Coke Utility* v. *Canadian Natl. Rys.*, 325 I.C.C. 527, 530.

Canada Packers urged in the Court of Appeals, as it does here, that its case is squarely within this Court's decision in *News Syndicate* and its decision in *Lewis-Simas-Jones* v. *Southern P. Co.*, 283 U.S. 654, discussed later herein, which followed and restated the *News Syndicate* principles. In dealing with petitioner's contention, the court below stated that while there was a through rate from a point in Canada to New York City, the *New Syndicate* decision pointed out that it was duty of the railroad to establish a rate from the international boundary to New York City, in the absence of which the shipper had been compelled to pay the through charges. The Court of Appeals then said (R. 39), "In the case at bar, rates from New Mexico to the border points were in effect and hence this case is not governed by *News Syndicate.*" The lower court erred in so concluding and its subsequent conclusions respecting the *Lewis-Simas-Jones* case were necessarily also erroneous.

II.

The Court of Appeals erred in holding that this case is not controlled by the decisions in News Syndicate and Lewis-Simas-Jones.

The lower court's discussion of the *News Syndicate* and *Lewis* cases and its conclusion that those cases are not governing here clearly show that it misunderstood what this Court said with respect to the railroads' obligation under the Act to establish just and reasonable rates applicable from or to the international boundary. Petitioner respectfully submits that in distinguishing the case at bar from the decision in *News Syndicate*, the Court of Appeals fell into the same error that caused the state court in *Lewis-Simas-Jones* to hold that the *News Syndicate* case was not controlling in that proceeding.

In the *Lewis* case, the defendant was an American railroad which had joined with a Mexican railroad in a joint through international rate on cow peas from Navojoa, Mexico, to San Francisco, California. The shipments moved through the border point of Nogales, Arizona. Upon complaint, the Commission found the joint rate unreasonable and ordered the American carrier to pay the full amount of reparation, including that portion representing charges attributable to transportation in Mexico. The railroad refused to make payment, and the shipper brought suit in a state court to enforce the award.

The trial court found that the railroad also maintained a rate from Nogales to San Francisco on this same commodity which was lower than the joint through rate, that the Commission had made no finding respecting the lawfulness of this lower rate and that it was reasonable and lawful for application on shipments from the border point

to San Francisco. It dismissed the shipper's suit on the ground that the Commission's order was void for lack of jurisdiction. (283 U.S. 654, 656, 657)

On appeal, the district court of appeal affirmed, stating that unlike *News Syndicate*, the railroad in the instant case had maintained a rate from the boundary to destination and that the shipper had not been compelled to pay the joint through rate by reason of any violation of the Act on the part of the defendant.

This Court reversed, holding that the lower court erred in distinguishing the case from *News Syndicate* and that *News Syndicate* was controlling. (283 U.S. 654, 659, 663) In passing on the lower court's conclusion regarding the applicability of the rate from the border point to destination, this Court said (page 663 of 283 U.S.) "The trial court's findings are not sufficient to show that at the time the shipments in question moved defendant maintained a just and reasonable rate *applicable* to the transportation of such shipment over its lines from the international boundary to destination. The tariff, as described in the findings, does not purport to *apply* to the American part of such international transportation." (Emphasis supplied)

The Court of Appeals in this proceeding failed, as did the state court in the *Lewis* case, to recognize that there can be only one rate applicable on a given shipment. In the instant case there is no question between the parties as to which set of rates were applicable, for petitioner and respondents have stipulated (R. 26) that "On all of these shipments defendants assessed the *applicable* single-factor, *joint through rates* from the mentioned United States origins to the described destinations in eastern Canada, * * *." (Italics added).

The stipulation simply confirms a fundamental principle of transportation law that joint rates take precedence over any combination of interim rates. In *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234, which involved joint through rates, this Court said "The tariff rate, although unlawful because excessive, was as between shipper and carrier the only legal rate. Neither would have been at liberty to avail itself of more favorable rates for any part of the through carriage." See also *Baltimore & O. S. W. R R. Co.* v. *Settle*, 260 U.S. 166, 172.

This rule of law is incorporated in the tariff circular regulations of the Commission at 49 C.F.R. 141.55:

> When a rate, whether local or joint, from point of origin to destination, has been established via a route, it becomes the only legal rate for through transportation via that route, whether it is greater or less than the aggregate of intermediate rates.

It is evident that this Court, in finding that the railroads in the *News Syndicate* and *Lewis* cases had failed to establish rates between the international boundary and points in the United States, was referring to the establishment of legal rates—that is, rates which were applicable to the shipments in question to the exclusion of all other rates published by the railroads. To labor the point somewhat, the joint through international rates assessed on petitioner's shipments, were the only legal rates for the through transportation. It follows, therefore, as in *News Syndicate*, that the railroads' failure to establish rates applicable between the international boundary and points in the United States as required by the Act, compelled Canada Packers to pay the through charges and invoked the jurisdiction of the Commission to determine whether petitioner had been damaged by the respondents' violation in failing

to establish such rates. This is a concept which the court below did not understand and which caused it to conclude that respondents had met the burden of proving rates from the New Mexico origins to the border points.

The New Mexico to border point rates are in precisely the same category as was the rate from the border point to San Francisco described in the *Lewis* case and the lower court here committed the same error made by the state court in that proceeding. On this point, the Court, after noting that the rates from the Arizona border to San Francisco did not apply, said (page 663) "the lower court erred in distinguishing this case from the *News Syndicate Co.* v. *New York-C. R. Co.*" case and "That case controls this one." Petitioner respectfully submits that case also controls this one.

III.

Petitioner's damages cannot properly be measured by the rates from New Mexico to the border points.

After finding that the railroads met the burden of proving the rates from Carlsbad and Loving to the Canadian border points, the lower court concludes that those rates must be considered as a maximum guide in awarding damages to Canada Packers (R. 40). Petitioner respectfully avers that, in so holding, the court below again misinterpreted the decisions in *News Syndicate* and *Lewis-Simas*.

The crux of those decisions approving full reparation, without any reduction for that portion of freight charges representing transportation within the foreign country, is clearly stated, at page 660 of the *Lewis* case, where the Court said:

> The collection by a common carrier of exorbitant charges is a tort (*Smith* v. *Chicago & N. W. R. Co.*, 49

Wis. 443, 448, 5 N.W. 240) and the general rule as to liability of joint tort-feasors applies where two or more connecting carriers combine to impose excessive charges for transportation over their connecting lines. *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 232, 233, 70 L.ed. 242, 249, 250, 46 S.Ct. 73. Defendant is liable for any violation of the Act by it that caused or contributed to cause damage to plaintiff without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier. *News Syndicate Co.* v. *New York C. R. Co. supra* (275 U.S. 187, 188, 72 L. ed. 228, 229, 48 S. Ct. 39).

The decision in *Louisville & N. R. Co.* v. *Sloss-Sheffield Co. supra,* makes it abundantly plain why the defendant carriers are liable for the full amount of damages regardless of the proportion of the excess charges which may be attributable to any single railroad or group of railroads. The rates in question in that case were "strictly joint through rates" (page 233) which the Commission had held exceeded maximum reasonable rates by 35 cents per ton. Reparation was awarded on that basis. The defendant, Louisville & Nashville, contended that the reparation award was void as to it to the extent it exceeded 23 cents which amount the railroad claimed was its share of the excessive charges.

In rejecting that argument, the Court said at page 232:

> The Commission held early, and has consistently held since, that carriers who by means of a joint through rate make excessive charges are liable jointly and severally for all the damage sustained. (citing cases including *Black Horse Tobacco Co.* v. *Illinois C. R. Co.*, 17 I.C.C. 588.)

And at page 234, the Court went on to say:

> The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful

> receipt or unjust enrichment by the carrier. Every carrier who participates in the infliction of this wrong is liable *in solido* like every other joint tort-feasor. The tariff rate, although unlawful because excessive, was as between shipper and carrier the only legal rate. (italics supplied)
>
> • • •
>
> The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole.

The foregoing cases make it evident that the respondents herein are joint tort feasors, and as such, are responsible for the entire damages without regard to whether or not they were individually responsible for the total injury inflicted upon petitioner. Section 8 of the Interstate Commerce Act provides, in effect, that, if any carrier shall do or shall cause to be done anything declared unlawful by that chapter, "such common carrier shall be liable to the person or persons injured thereby for the *full* amount of damages sustained in consequence of any such violation." (Italics supplied). See *International Nickel Co.* v. *Director General,* 66 I.C.C. 627, 628 and *News Syndicate,* 275 U.S. 179, 187. Petitioner respectfully submits that the lower court's use of the New Mexico to border rates as a maximum guide in determining damages is contrary to these important and well settled precedents.

There are other compelling reasons which should lead this Court to conclude that the Court of Appeals' maximum guide test is erroneous. The effect of the lower court's use of the New Mexico-to-border-point rates as a maximum guide for reparation purposes is to apply retroactively to petitioner's international shipments rates which did not apply under the governing tariffs. Stated differently, the lower court is attempting to substitute for the joint through

international rates the domestic rates from the New Mexico origins to Port Huron and Detroit. The result clearly violates the principle that a joint rate supersedes any combination of intermediate rates and is the only legal rate.

Further, if the lower court's judgment is permitted to stand, American railroads will be in position to establish and charge excessive joint through international rates with full impunity so long as they also maintain lawful rates between domestic points and the international boundary. Under that decision, the domestic rates would serve as the maximum measure of the injury to a shipper who was compelled to pay unreasonably high joint through rates. Obviously, if the rates between American points and the boundary were reasonable, the shipper would not be entitled to any damages. It is equally as obvious, however, that the shipper has been injured, but under the Court of Appeals' decision it would be an injury for which the law provides no remedy. The Commission has repeatedly rejected railroad arguments, which if accepted, would have resulted in the same inequitable situation that will confront all international shippers if the lower court's judgment is affirmed. See *Wolfe Fruit Co.* v. *Beaumont S. L. & W. Ry. Co.*, 211 I.C.C. 661, 662; also, Commissioner Eastman's concurring opinion in *Cynanamid and Cyanide From Niagra Falls*, 155 I.C.C. 488, 501, 502.

IV.

The connecting Canadian railroads are not necessary parties to this proceeding.

The Court of Appeals closes its opinion with the conclusion that the territorial limitation provisions of Section 1 of the Act prohibit the Commission from awarding reparation to a Canadian consignee on account of freight charges received for transportation performed within

Canada by Canadian railroads not parties to this action (R. 40). Petitioner has previously pointed up the lower court's error with respect to the territorial limitation of Section 1 and will not repeat those arguments here.

The court below was obviously influenced in some measure in reaching its decision by the fact that the Canadian carriers are not defendants in this proceeding. However, it is clear from the Court's decisions in the *News Syndicate* and *Lewis* cases that the Canadian railroads are not indispensable parties to an action of this nature. The foreign railroads were not parties in either of those cases. In the *News Syndicate* case, one of the several questions certified by the Court of Appeals specifically asked whether the suit could be maintained solely against the United States carrier. This Court answered in the affirmative (275 U.S. 179, 186, 188).

In the *Lewis* case the only defendant was the American railroad which handled the shipment from the border point to San Francisco. The fact that the Mexican line was not a party was immaterial for the Court held that the American defendant, as a joint tort feasor, was liable for all of the excess charges without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier (283 U.S. 654, 660).

The Interstate Commerce Act does not authorize or forbid the railroads to make joint through international rates. (Footnote 1, page 660 of *Lewis*.) But the Act does require defendants to establish just and reasonable rates applicable on international commerce in so far as the transportation takes place in the United States; in other words, between United States points and international borders. When railroads fail to establish lawful rates applicable to that

service they violate the act (as have respondents herein) and are liable to any person injured by their failure to do so.

When American railroads voluntarily join with Canadian carriers in an excessive joint through international rate, the Commission has jurisdiction to determine the reasonableness of that rate in deciding what damages the injured shipper has sustained. That the United States carriers may not be the sole cause of all the damage is immaterial. As joint tort-feasors they are responsible *"in solido"* for the injury.

These are the rulings of *News Syndicate* and *Lewis,* and lower court's decision, petitioner submits, is in direct conflict therewith.

IN CONCLUSION

Petitioner submits that the decision of the Court of Appeals is erroneous and should be reversed and the judgment of the District Court affirmed. Petitioner further urges that the case be referred back to the District Court for the assessment of costs and the determination of a reasonable attorney's fee to be paid by respondents to petitioner as authorized by Section 16(2) of the Interstate Commerce Act.

Respectfully submitted,

CHARLES B. MYERS
Attorney for Canada Packers, Ltd., Petitioner
611 Field Building
Chicago, Illinois 60603

Due: September 9, 1966

APPENDIX

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT, 24 STAT. 379, et seq. (49 U. S. Code § 1, et seq.)

SECTION 1 (49 U. S. Code § 1) provides:

CARRIERS SUBJECT TO REGULATION.

(1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment * * *.

* * * * *

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

TRANSPORTATION SUBJECT TO REGULATION.

(2) The provisions of this chapter shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States * * *.

* * * * *

JUST AND REASONABLE CHARGES.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * *

SECTION 6 (49 U.S. Code § 6) provides:

SCHEDULE OF RATES, FARES, AND CHARGES; FILING AND POSTING.

(1) Every common carried subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. * * *

* * * *

TRANSPORTATION WITHOUT FILING AND PUBLISHING RATES FORBIDDEN; REBATES; PRIVILEGES.

(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are trans-

ported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * *

SECTION 8 (49 U. S. Code § 8) provides:

LIABILITY IN DAMAGES TO PERSONS INJURED BY VIOLATION OF LAW.

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

* * * *

SECTION 16 (49 U. S. Code § 16) provides:

AWARD OF DAMAGES.

(1) If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

PROCEEDINGS IN COURTS TO ENFORCE ORDERS; COSTS; ATTORNEY'S FEE.

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therin stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 11

CANADA PACKERS, LIMITED, PETITIONER

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

This brief is submitted by the Interstate Commerce Commission as *amicus curiae* pursuant to Rule 42 of the Rules of this Court, in view of the substantial question of the Commission's statutory jurisdiction over international rates raised by the parties and the United States.

STATEMENT

This appeal raises the question whether the Commission possesses statutory jurisdiction to order the appellee railroad to pay the petitioner, a Canadian shipper, reparation based on the determination that

the joint through rates[1] on various shipments of potash from New Mexico into Canada were unjustly and unreasonably high. Involved are 1948 shipments of potash from Carlsbad and Loving, New Mexico, to several Canadian destinations. The Commission found that the rates assessed exceeded a just and reasonable level by a total of $6,694.56 and awarded the Canadian corporation reparations of that amount. The railroads paid the shipper $5,304.01, the difference representing the share retained by the Canadian railroads for that portion of the transportation that occurred beyond the international boundary. The shipper sued for the difference, and the district court sustained the entire reparations award (R. 33–34). The court of appeals reversed (342 F. 2d 563, R. 36), holding that, since the domestic railroads had on file rates from the involved origins to points on the international boundary,[2] a just and reasonable level of

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[1] The rates here in issue are "through rates" in the sense that they contemplate continuous carriage from origin to destination. They are "joint rates" in the sense that they have been established by two or more carriers as a single charge from origin to destination with each carrier obtaining an agreed-upon "division" of such charge. In the absence of an agreed-upon charge for this transportation, the rates would be "through", but not "joint"; and the several carriers would be required to file "the separately established rates * * * applied to the through transportation" by Section 6(1) of the Act, 49 U.S.C. 6(1). The separately established rates may be "local rates" or "proportional rates," commonly the former. See *Brown & Sons Lumber Co.* v. *L. & N.R. Co.*, 299 U.S. 393, 395.

[2] The reasonableness of rates to the border and to Canada on this same traffic had been decided by the Commission in an earlier proceeding. *Consolidated Rendering Company* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 300 I.C.C. 87.

such domestic rates affords the maximum guide in awarding damages to the shipper. "To conclude otherwise would mean that the defendant railroads would be required to pay reparation to a Canadian consignee on account of freight charges received for transportation performed within Canada by Canadian railroads which are not parties to this action. Such a result clearly is prohibited by the territorial limitation provisions of section 1 of the Interstate Commerce Act, 49 U.S.C.A. §§ 1, *et seq.*" (R. 40).

INTRODUCTION

The United States, *amicus curiae,* urges that both the court of appeals and the Commission erred. While conceding that "since the American carrier and the foreign carrier have agreed among themselves on a single rate for the entire international journey, they should be deemed jointly liable if the rate is excessive" (Br. 24), it nevertheless advances the proposition that "the Commission has no power to determine what is a reasonable charge for a transportation service performed partly within a foreign country, and hence no power to determine, for reparation or other purposes, when a joint through international rate or a combination of proportional rates for an international rail shipment—in either case a charge involving foreign transportation—is unlawful" (Br. 11–12). It would find the joint through rate excessive as to the domestic railroads only to the extent that the agreed division that they receive exceeds what the Commission may determine to be a just and reasonable level for proportional rates (Br. 12). We disagree.

In our view the Act authorizes the Commission to consider the lawfulness of a joint through rate to or from an adjacent foreign country in accordance with the standards set forth in the Interstate Commerce Act. If relief for the future is asked, the Commission, although it may not prescribe the rate for application in a foreign country, may take the lesser step of issuing an order against the American carrier that requires it to charge a reasonable through rate or cease its participation in the agreed joint rate. If the issue is discrimination, the Commission may enter an order requiring the American carrier to end the discrimination.

If, as in the present case, the shipper seeks only reparation for past injury, the Commission may again consider the entire rate in accordance with the American standard, and compute damages based on the unlawfulness found in the entire joint through rate. The American carrier is liable for the full damage to the shipper on the ground that the American carrier is a joint tortfeasor in the publication and collection of an unreasonable joint through rate for the transportation from origin to destination.

We further believe that even if the Commission's jurisdiction is held to be limited to a consideration of rates, or portions of rates, to the border points, the measure of damages based on divisions agreed upon between the railroads, as proposed by the United States, is improper and unworkable.

ARGUMENT

The United States argues "that the Commission has no power to determine what is an unreasonable charge for a transportation service performed partly within a foreign country * * *" (Br. 11). We believe the statute and its legislative history support the view that the Commission has this power.

Under Section 1(1), the Commission has authority over "carriers engaged in (a) The transportation of passengers or property * * * from or to any place in the United States to or from a foreign country."[3] The section does not grant jurisdiction "to or from border point crossings" but rather "to or from a foreign country." The language of the statute conveys clear authority over foreign commerce.

The proviso on which the United States heavily relies provides that the Commission's jurisdiction extends "only in so far as such transportation takes place within the United States." But this, in our view, means that an order affecting foreign commerce is valid so long as it runs against a carrier performing some transportation within the United States. The proviso limits the personal jurisdiction of the Commission, not its subject matter jurisdiction. Sec-

[3] The limits of jurisdiction are precisely defined by the section as extending to transportation "from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States."

tion 1(1) grants broad authority over foreign commerce; the sole limitation is that valid orders may be issued only against carriers providing transportation within the United States. Our reading is also supported by Section 1(2)(c) of the Act, 49 U.S.C. § 1 (2)(c), which shows that where Congress has wanted to exempt certain carriers that otherwise "would * * * be subject to the provisions of this part" because they perform some land transportation, it has done so expressly.

The United States would limit the Commission to a consideration of only the domestic portion of an indivisible journey to or from a foreign country. Such an interpretation, we submit, would foreclose the very jurisdiction over foreign commerce to which the proviso pertains. Moreover, Section 20(11) of the Act, 49 U.S.C. § 20(11), admittedly extends to the entire transportation with an adjacent foreign country;[4] the United States would apparently recognize that the Commission has jurisdiction to enter a "released rates" order pursuant to this section on the basis of the entire joint through rate, while denying that any other form of order under a different section relating to such transportation is permissible.

The proviso to Section 1(1) on which the United States relies did not appear in the original "Act to regulate commerce," approved February 4, 1887.[5]

[4] See Brief for the United States, p. 25.

[5] 24 Stat. 379.

The original Act was applicable both to foreign commerce and, like the present statute, "from any place in the United States through a foreign country to any other place in the United States." The clause relating to foreign commerce read "from any place in the United States to an adjacent foreign country" (24 Stat. 379).

The Solicitor General seems to be referring to the portion of the history relating to the "through a foreign country" clause, when he states (p. 14, n. 4), that the legislative history of Section 1(1) has to do with "extra-territorial application of the Act * * * in special instances which are not relevant here." However, we believe the footnote overlooks relevant legislative history.

The original Act to Regulate Commerce was applicable to railroads engaged in transportation "from any place in the United States to an adjacent foreign country," without any proviso. In reporting the bill which became the 1887 Act to the Senate floor, Senator Cullum explained:[8]

> While the provisions of the bill are made to apply mainly to the regulation of interstate commerce, in order to regulate such commerce fairly and effectively it has been deemed necessary to extend its application also to certain classes of foreign commerce which are intimately intermingled with interstate commerce, *such as shipments between the United States and adjacent countries by railroad,* and the transportation by railroad of shipments

[8] 17 Cong. Rec. 3472, April 14, 1886.

> between points in the United States and ports of transshipment or of entry when such shipments are destined to or received from a foreign country on through bills of lading. To avoid any uncertainty as to the meaning of these provisions in regard to what may be at the same time in some instances State and foreign commerce, it is expressly provided that the bill shall not apply to the transportation of property wholly within one State and not destined to or received from a foreign country. [Emphasis added.]

Thus, the bill undertook "to regulate foreign commerce so far as interstate shipments by rail are concerned." *Id.* at 3723, April 22, 1886.

The proviso came into the act in the Transportation Act of 1920, 41 Stat. 474. Prior to the 1920 legislation, the entire Commission had held in *Black Horse Tobacco Co.* v. *Illinois Central R.R. Co.*, 17 I.C.C. 588, 590–91, that it had jurisdiction (1) to require American carriers to cease applying an unlawful joint through rate on traffic into Mexico, and (2) to award reparation on the entire through rate, since "every carrier party to a joint rate is jointly and severally responsible for that rate."

The House bill (H.R. 4378) which became the Transportation Act of 1920 confirmed the Commission's jurisdiction over commerce to an adjacent foreign country, and added to the provisions of Section 1 a jurisdiction over traffic "from an adjacent foreign country to any place in the United States."[7] Com-

[7] During the course of the legislative history of the 1920 Act, some carriers were litigating whether the Act (specifically

missioner Clark in testifying for the Commission favored the addition to jurisdiction as follows:[8]

> It is a general provision that puts that transportation under the provisions of this act and makes entirely clear in the statute what we have uniformly held—that we had jurisdiction of that transportation in so far as it was performed within the confines of the United States, and that if the carriers should persist in maintaining a joint through rate which we found to be unduly prejudicial or unjustly discriminatory, we had the *power to require the carrier operating within the United States* to withdraw its concurrence from that joint through rate and establish a reasonable proportional or other rate for the transportation from the boundary to destination in the United States. [Emphasis added.]

The report of the House committee, which added the proviso here in issue, apparently formalized what the Commission had been doing, for it merely stated,[9]

> Section 400 [of the bill] amends the first five paragraphs of section 1 of the commerce act, making minor corrections and clarifying the

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Section 20(11)) applied to traffic *from* a foreign country. The Supreme Court decided that even the language of Section 20(11), in terms of "from the United States to an adjacent foreign country," applied on traffic in the opposite direction. *Galveston, &c. Ry. Co.* v. *Woodbury*, 254 U.S. 357, 359, decided December 13, 1920.

[8] "Return of the Railroads to Private Ownership," Hearings on H.R. 4378 before House Committee on Interstate and Foreign Commerce, 66th Cong., 1st Sess., vol. 1, p. 10 (1919).

[9] H. Rep. 456, 66th Cong., 1st Sess., p. 27.

language in several respects, but makes no important change in policy.

Shortly after the passage of the 1920 Act, the entire Commission reiterated its view that it possessed jurisdiction to consider the entire joint through rate in *International Nickel Co.* v. *Director General,* 66 I.C.C. 627. As recently as 1962, the Commission reported to Congress its interpretation of the jurisdictional provisions of Section 1(1), including the proviso language. Commissioner Murphy, for example, then testified before the Senate Committee on Commerce that the Commission had often held that it could not prescribe international rates. He continued as follows:[10]

> The Commission, however, has many times held, as in the cited case, that where a U.S. railroad enters into through route and joint rate arrangements with foreign railroads, it will be held responsible for the lawfulness of the through rate, both with respect to reparation for past unreasonable rates and as to rates for the future. The decisions indicate that if the foreign railroads are unwilling to establish joint through rates on the basis found to be lawful, it is the duty of the U.S. carrier to withdraw from the joint rates and establish rates to and from the boundary which are just, reasonable, and otherwise lawful.
>
> The CHAIRMAN Well, what if the carrier does not do it?

[10] "Problems of the Softwood Lumber Industry," Hearings before the Senate Comm. on Commerce, 87th Cong., 2d Sess., Part I, p. 129 (1962); see also Part IV, p. 972.

> Mr. MURPHY. You mean the——
>
> The CHAIRMAN. Well, you say it is the duty of the U.S. carrier to withdraw from the joint rates and establish rates to and from the boundary that are just and reasonable and lawful. What if the carrier does not do it?
>
> Mr. MURPHY. The Commission can, on a proper record, order them to do that.

In the forty-six years since the enactment of the Transportation Act of 1920, both Congress and the railroads have acquiesced in the views of the Supreme Court and of the ICC that the Commission possesses jurisdiction to order reparation based upon an entire joint through rate between the United States and Canada. The Act has been amended numerous times, including the major codification and revision in the Transportation Act of 1940, 54 Stat. 898, but no question has been raised concerning the Commission's consistently asserted jurisdiction over such rates.[11]

The Commission finds nothing anomalous in its considering the reasonableness of the entire joint rate, a single charge to the shipper and the only rate that legally may be charged when it is filed.[12] The Inter-

[11] An established and unvarying administrative interpretation of a statute acquiesced in for many years, will not be overturned except for cogent reasons. *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *Public Utilities Com'n.*, 345 U.S. 295, 314–15; *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 179.

[12] We further see no "apparent implication" (Br. of U.S., p. 21, n. 9) of the Court's opinion in *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, discussed hereinafter, that somehow American carriers may file more than one rate and give the shipper a choice. The Court plainly stated that the joint rate was there charged since no rate to the border was

state Commerce Act attaches to such transportation by its terms, a matter no more anomalous than the fact that the antitrust laws apply to conduct of American corporations in foreign countries (*e.g., Continental Co.* v. *Union Carbide,* 370 U.S. 690, 704, 706).

American carriers are held liable for the entire unlawfulness inherent in an international joint rate, since they are joint tortfeasors in the promulgation and charging of such rates. The collection of an unreasonable charge is a tort (*Adams* v. *Mills,* 286 U.S. 397, 407); and "the general rule as to liability of joint tort-feasors applies where two or more connecting carriers combine to impose excessive charges for transportation over their connecting lines" (*Lewis-Simas-Jones Co.* v. *Southern Pacific Co.,* 283 U.S. 654, 660).[13]

(or could be) legally "applicable" after the filing of the joint rate. (275 U.S. 179, 187). And see *Cyanamid and Cyanide From Niagara Falls,* 155 I.C.C. 488, 491.

[13] In *Great Northern* v. *Sullivan,* 294 U.S. 458, the Court refused to permit a shipper to show the unlawfulness inherent in a proportional rate to the border point, holding that the Commission must determine whether the entire charge is unreasonable. Notwithstanding *Atlantic Coast Line R. Co.* v. *Smith Bros. Inc.,* 63 F. 2d 747, 748 (C.A. 5), certiorari denied, 289 U.S. 761; and *Atlantic & Y. Ry. Co.* v. *Carolina Button Corp.,* 74 F. 2d 870 (C.A. 4), the Commission has applied *Sullivan* only where the combination rates are made up of proportional rates and not where they are made up of local rates. See *Yellow Jacket Boat Co., Inc.* v. *A.T. & S.F. Ry. Co.,* 305 I.C.C. 113, 116–17. It is not clear from the cases cited by the United States (Br., p. 16) whether the combination rates there considered were composed of locals or proportionals, except in *Western Peat Co.* v. *Illinois Central R. Co.,* 297 I.C.C. 273. But the *Western Peat* proportional only related to a technical

Just as in *H. K. Porter Co.* v. *Central Vermont R. Co.*, 366 U.S. 272, involving a finding of preference and prejudice based upon the entire joint through rate, the orders in *News Syndicate* and *Lewis-Simas-Jones*, contrary to the position of the United States (p. 15, n. 5) similarly "affected only the American part of the transportation." In all three cases the entire joint through rate was considered and the order so drawn as to run only against carriers performing some transportation within the United States.

The Commission has consistently refrained from prescribing joint through rates (Br. for the U.S., p. 18, and cases cited).[14] Its orders run exclusively against carriers engaged in transportation in the United States, and hence it is without authority to require Canadian or Mexican carriers to agree on joint rates to or from their countries. To prevent unlawfulness in the future, the Commission will issue a cease and desist order requiring American carriers to cease preference and prejudice, as in the *H. K. Porter Co.* case, or to end participation in unreasonably high joint rates unless such rates be voluntarily reduced.[15] The Commission has not in any manner

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question under Section 4 of the Act, rather than jurisdiction under Section 1; and it further reached a result consistent with a similar interpretation by a Canadian court, as discussed in footnote 18, *infra*.

[14] The Canadian Board has taken a similar position concerning its authority. See *West Lorne Lbr. Co.* v. *Canadian Pacific Railway*, 70 C.R.T.C. 23, 31 (1953).

[15] *Black Horse Tobacco* case, *supra*; *Spanish River Pulp & Paper Mills* v. *A. & W. Ry. Co.*, 120 I.C.C. 251, cited in *News Syndicate*; *Cyanamid and Cyanide From Niagara Falls*, 155 I.C.C. 488, 492, and cases cited; *Federated Metals Corp.* v.

directly interfered with the jurisdiction of any foreign government.

The United States would authorize the Commission to determine the lawfulness of the rate to the border, and compel the shipper to seek reparation in Canada for that part of the transportation service which occurred in Canada. The anomaly of the position appears in the fact that (1) the law of Canada recognizes the ICC's jurisdiction over an entire joint through rate, and (2) the agencies and courts of Canada exercise an identical concurrent jurisdiction over the entire joint rate when suit is brought in that forum. The position of the United States would disrupt the rule of international conflict of laws recognized in this field by Canada, and deny to the Commission the concurrent jurisdiction over the entire joint rate exercised by the Canadian Board of Transport Commissioners.[16]

In the first "Stoy" case[17] before the Canadian Board, the American carrier had filed a "joint tariff" setting forth one through rate on petroleum and its products from Stoy, Indiana, to Canada. The con-

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Pennsylvania R. Co., 185 I.C.C. 399; *Sherman Lbr. Co.* v. *Atlantic Coast Line R. Co.*, 293 I.C.C. 261, 263, 264; *Chas. H. Lilly Co.* v. *Great Northern Ry. Co.*, 298 I.C.C. 407, 410.

[16] The Canadian Board is without power to order reparation. It may issue a declaratory order stating what the lawful rate was or should have been, but recovery, if any, can be obtained only through the courts, pursuant to Section 385 of the Railway Act, R.S.C., 1927, ch. 170. See *Brown Motor Co.* v. *Canadian Pac. Ry.*, 75 C.R.T.C. 230, 236 (1957); *Canadian Shippers' Traffic Bur.* v. *Canadian National Ry.*, 32 C.R.C. 3, 6 (1926).

[17] *British American Oil Co.* v. *Grand Trunk Ry. Co.*, 9 C.R.C. 178 (1909).

necting railroad in Canada (Grand Trunk Ry. Co.) filed an "exception" to the tariff, stating it did not concur, and that its local rates would apply from the border. The Board of Railway Commissioners For Canada (now Board of Transport Commissioners) applied Canadian law to the entire rate, holding:

1. With respect to the exception, "whatever effect that may have had in the United States, it can have none here. The procedure provided by the [Canadian] Railway Act must govern.". It further stated, "We cannot introduce here, or follow the practice established in the United States regarding 'exceptions,'" which violate Canadian law (p. 183).

2. A subsequent filing by the American carrier is also of no effect, since, unlike the United States law, "once a joint tariff is filed, unless it is dissallowed, it remains in force until replaced by another joint tariff, and it is not open to the carrier filing it to destroy its effect by filing a supplement alleging that the sum of the locals shall be substituted for the joint through rate" (p. 187).

3. The "only legal rate from Stoy to Toronto" was the originally filed joint rate (*ibid.*); the Grand Trunk "should be at liberty to refund the difference between that sum and the amount collected" (p. 190).

The Board's decision was sustained by the Supreme Court of Canada, *sub nom. Grand Trunk R.W. Co.* v. *British American Oil Co.*, 43 S.C.R. 311, 11 C.R.C. 118 (1910). The Canadian Board later followed this decision in the second "Stoy" case, *British American Oil Co.* v. *Canadian Pacific Ry. Co.*, 12 C.R.C. 327 (1911), noting that respondent alleged that its United

States connections "have refused to join in any refunds" since the rates charged were the legal and proper rates under the Interstate Commerce Act. The Board stated (p. 333):

> It does not seem that we can enter into consideration of the effect of what was done in the United States, or under the laws there; whether the carriers there have refused to join in refunds, or whether they are morally entitled to do so or not.

Recently, a Canadian court has specifically recognized the concurrent jurisdiction of the Commission, stating, "As to rates for routes from the United States of America into Canada, the Interstate Commerce Commission has authority to consider the entire route and the rate therefor." *Direct Winters Transport Ltd.* v. *Duplate Canada Ltd.*, 83 C.R.T.C. 54, 68 (1962).[18]

The United States would limit the shipper's recovery against the United States carrier to an amount by which a hypothetical rate to the border exceeds the division agreed upon between the United States and the foreign carrier. If a joint rate is published, such rate takes precedence over any combination of rates. Any rate to the border would be only a hypothetical

[18] At the same time the Canadian Court held that the sum of Canadian and United States factors (locals or proportionals) may not be compared to the joint through rate published in an ICC tariff in determining whether the latter rate is higher than the "aggregate of intermediate rates," and hence a violation of Section 4 of the Interstate Commerce Act. 83 C.R.T.C. at 68. The ICC had made the identical interpretation of the requirements of Section 4 in the *Western Peat* case. footnote 13, *supra*.

rate for the service in question. The rates to the border would not necessarily provide the proper measure of the joint rate, since they might be filed with some other use in mind in forming through rates.

The United States assumes, we think improperly, that the shipper's recovery should be limited by the amount received by the American carrier. This Court rejected such an argument in *News Syndicate,* holding that the shipper is entitled to recover his damages sustained in consequence of the carrier's failure to make or publish a lawful rate. The shipper's "right to reparation does not depend upon the amounts retained by defendants in error [the railroads] pursuant to agreed divisions" (275 U.S. at 187). The shipper's theory of recovery is actual damages, not *quantum merit.*

Although divisions may be useful as evidence of the reasonableness of the rates charged,[19] they are not conclusive, for they are governed by statutory standards totally different from those applicable to rates. Under Section 1(4) rates must be just and reasonable, and Section 15a(2) directs the Commission to consider certain specific standards; neither section applies to divisions between carriers. The latter are governed by the standards of Section 15(6), which requires, among other things, consideration of any facts or circumstances which entitle one carrier to

[19] For example, if the railroads have evidence that conditions in Canada require relatively higher rates, they should present such evidence to the Commission for its consideration. See *Cyanamid and Cyanide From Niagara Falls*, 155 I.C.C. 488, 497. No such evidence appears in the present record.

more or less than another carrier to a given division. Section 15(6) does not and cannot be made to govern the limit of a shipper's recovery for damages occasioned by unlawful carrier conduct in foreign commerce.

CONCLUSION

In the more than fifty years since the Commission's decision in the *Black Horse* case, there has been no evidence that the Commission's jurisdiction to consider the lawfulness of an entire joint through rate in foreign commerce has either discouraged the publication of such rates or in any way affected our relations with Canada or Mexico. On the contrary, the Canadian Board simultaneously exercised a concurrent jurisdiction in the *"Stoy"* cases when *Black Horse* was decided. And we are unable to find a single American or Canadian case involving a suit between an American and Canadian (or Mexican) railroad for contribution. This indicates to us that American carriers are consistently able to obtain contribution through informal channels when held liable as joint tortfeasors for the unlawfulness in the entire international rate.

In contrast to the apparent ease with which the American carriers over a very long period have amicably settled their relative liability for reparations with their foreign counterparts, the approach of the United States would increase the burden of shippers seeking to obtain reparation. The shipper would be required to bring separate suits in the United States and in Canada, a procedure that we doubt would be

feasible to obtain a small award, such as is involved in the present case.

We submit that no legal or practical need has been shown for reversal of the long-standing decisions of this Court governing international rates. The court of appeals erred in holding that the railroads had "met the burden of proving" the rates from New Mexico to the border points, and that such rates "must be considered as maximum guides in awarding damages to plaintiff" (Canada Packers) (R. 40). We submit that the decision of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,

LEONARD S. GOODMAN,
Assistant General Counsel,
Interstate Commerce Commission.

SEPTEMBER 1966.

I authorize the filing of the foregoing brief.

THURGOOD MARSHALL,
Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 11

CANADA PACKERS, LIMITED,

Petitioner,

VS.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF.

HARVEY HUSTON,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Respondents.

FLOYD STUPPI,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Of Counsel for Respondents.

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OPINIONS BELOW.

The opinion of the Court of Appeals (R. 36-40) is reported at 342 F. (2d) 563. The findings of fact and conclusions of law of the District Court (R. 33-34) are not reported. The report of the Interstate Commerce Commission (R. 9-17) is reported at 313 I. C. C. 759; its reparation order entered August 28, 1962 (R. 19-21) is not reported.

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1. The Atchison, Topeka and Santa Fe Railway Company; The Chesapeake and Ohio Railway Company; Chicago, South Shore and South Bend Railroad; Detroit, Toledo and Ironton Railroad Company; Elgin, Joliet and Eastern Railway Company; Grand Trunk Western Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Wabash Railroad Company.

JURISDICTION.

The judgment of the Court of Appeals was entered March 2, 1965, and a timely petition for rehearing was denied April 16, 1965 (R. 41-42). The petition for a writ of certiorari was filed July 14, 1965, and was granted February 21, 1966 (R. 43, 383 U. S. 906).

STATUTES INVOLVED.

The pertinent provisions of the Interstate Commerce Act here involved are Sections 1, 8 and 16, 49 U. S. Code §§ 1, 8 and 16, and are reproduced in the Appendix to the brief for Canada Packers, Limited, Petitioner.

QUESTION PRESENTED.

The basic question presented is as follows:

Where the Interstate Commerce Commission found that charges assessed for railroad transportation of shipments from origins in the United States to destinations in Canada were in excess of maximum reasonableness, and where the Commission also had made findings of maximum reasonableness of rates on contemporaneous shipments of the same commodity from the same origins to the border crossings through which the international shipments passed en route to Canada, did the Commission exceed its territorial jurisdiction in failing to observe the maximum reasonable rates to the border crossings as a maximum guide in awarding damages with respect to charges assessed on the international shipments?

STATEMENT.

Canada Packers, the petitioner, is a Canadian corporation which manufactures fertilizer at various locations in the Provinces of New Brunswick, Ontario and Quebec, Canada (R. 25).

In 1950 Canada Packers filed an informal complaint with the Interstate Commerce Commission alleging that the joint through charges paid for railroad transportation of 131 carload shipments of potash from Carlsbad and Loving, New Mexico[2] to petitioner's plants at Toronto and Welland, Ontario; Montreal, Quebec; and St. John, New Brunswick, Canada during the period January 5, 1948 through May 5, 1948 were unjust and unreasonable, and reparation was sought. All of the shipments crossed the international border at Detroit or at Port Huron, Michigan (R. 26-27).

Action on the informal complaint was deferred, awaiting decisions in related cases pending before the Commission, including its Docket 30578, *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 287 I. C. C. 673, 300 I. C. C. 87 (R. 27-28). On March 18, 1957, the Commission handed down its decision in *Consolidated Rendering, supra,* holding, among other things, that rates on potash that were in effect between January 5, 1948 and May 5, 1948 from Carlsbad and Loving to Detroit and Port Huron were unreasonably high and prescribing, retroactively, maximum reasonable rates on a lower level (R. 29). The Commission there found that the maximum reasonable rate which the carriers could charge during that period of time for a movement of potash from Carlsbad or Loving to Detroit or Port Huron was $12.70 per ton, and the Commission awarded reparation in the amount of 62¢ per ton, since the carriers had assessed a rate of $13.32 per ton (R. 29-30).

Canada Packers thereupon filed a formal complaint repeating the allegations of its informal complaint (R. 5-9, 30). The rates Canada Packers paid and the rates Canada

2. Shipments from Trona, California were also involved in the complaint before the Commission, but such shipments are not at issue here.

Packers contended were maximum reasonable rates are shown in the following comparisons on a rates-per-ton basis (R. 12, 15, 29-30):

Canadian Destination	Rate Charged	Rate Sought	Difference
Toronto, Ont.	$14.64[3]	$13.80	84¢[3]
Welland, Ont.	14.64[3]	13.80	84¢[3]
Montreal, Que.	17.28[3]	16.00	128¢[3]
St. John, N. B.	20.40	18.60	180¢[4]

The Commission, in its report in *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 313 I. C. C. 759 (1961), held that the rates assessed were unreasonable as alleged in the complaint and prescribed maximum reasonable rates, on the basis sought, retroactively for the period in which the shipments had moved (R. 17, 30-31). The Commission, in measuring the shipper's damages, rejected the contention of the railroads that it lacked jurisdiction to make an award exceeding the reparation award made in the *Consolidated Rendering* case to the border points, Detroit and Port Huron, at which these shipments crossed into Canada (R. 16-17).

Following an examination by the carrier of paid freight bills submitted by the shipper, the respondents made certification of the accuracy of the shipper's compilation of

3. The opinion of the court below shows the rates to Toronto and Welland as $14.60, and the difference from the rate sought as 80¢, while the rate to Montreal is shown as $17.20, and the difference from the rate sought as $1.20 (R. 37); the court apparently relied upon a portion of the stipulation of facts showing such rates (R. 30). The evidence before the Commission was conflicting as to the measure of the rates charged to these destinations, and conflicting sets of rates were inadvertently included in the stipulation of facts (R. 12, 15, 29-30). Respondents are satisfied that the figures shown in the foregoing table are correct; they are also consistent with those contained in petitioner's brief (p. 7). These discrepancies do not in any way affect the issues involved.

4. Based upon correction by the Court of Appeals of an obvious arithmetical error in the stipulation of facts (R. 37).

total transportation charges paid on these shipments. Thereafter, the Interstate Commerce Commission issued its order of August 28, 1962 (R. 19-21), specifying that Canada Packers was entitled to reparation from the carriers which transported the shipments "insofar as the transportation took place over their lines in the United States" and specified particular amounts of damages in dollars and cents, subject to the qualification "insofar as the transportation took place in the United States."

The respondents made payment of reparation to Canada Packers in a sum less than the total of the amounts pertaining to the involved shipments, as listed in the reparation order. The total of those amounts, excluding interest, is $6,694.56.[5] Payment was made in the sum of $5,304.01, plus interest, leaving a difference, excluding interest, of $1,390.55. The sum, excluding interest, that was paid by the carriers, was measured by the difference between the total of the amounts pertaining to these shipments as listed in the reparation order and a portion thereof representing the share retained by the Canadian railroads for that part of the transportation that took place beyond the international boundary. Stated otherwise, respondents declined to make payment of reparation on that portion of the freight charges that was paid for transportation within Canada (R. 32).

Canada Packers filed suit against the railroads[6] for the balance, $1,390.55 (R. 1-5). The District Court entered judgment for Canada Packers, stating that the failure of the United States railroads to establish lawful rates applicable to the transportation performed by them in the

5. Excluding shipments from Trona, California; see footnote 2, *supra*.

6. Only the United States railroads participating in the joint through rates were named in the complaint, although the Canadian carriers had been named as defendants, along with the United States carriers, in the Commission proceedings (R. 6, 31).

United States had compelled Canada Packers to pay the joint through international rates, and that, in consequence, the Commission was justified in awarding Canada Packers the full amount by which those rates exceeded the maximum reasonable rates as determined by the Commission (R. 33-34).

The railroads appealed, and the Court of Appeals for the Seventh Circuit reversed (342 F. (2d) 563) (R. 36-41).

Two issues were before the Court of Appeals. The first issue was whether or not respondents had complied with the Commission's order directing payment of reparation. That order, as noted, was qualified by the phrases "insofar as the transportation took place over their lines in the United States" and "insofar as the transportation took place in the United States" (R. 19-21). Respondents, by refusing to pay reparation in the total sums listed and instead paying to Canada Packers an amount computed by deducting the portion attributable to transportation performed in Canada, contended that they had in fact complied with the terms of the order in the light of its specific territorial limitations. This issue was discussed, but not resolved, by the Court of Appeals (R. 37-39).

The second issue, which was in fact resolved by the Court of Appeals, was whether, even if the respondents' interpretation of the language of the reparation order is not correct, the order is beyond the territorial jurisdiction of the Commission. In reversing the judgment of the District Court, the Court of Appeals held that since the respondents had demonstrated what the Commission itself had found, in the *Consolidated Rendering* case, to be contemporaneous maximum reasonable rates from the origins in New Mexico to the border points through which the Canada Packers international shipments moved, those prescribed rates must be considered as a maximum guide in awarding damages to

Canada Packers (R. 38, 40). A contrary conclusion, the Court held, would require respondents to pay reparation on account of freight charges paid for transportation performed within Canada by Canadian railroads, a result prohibited by the territorial limitations of Section 1 of the Interstate Commerce Act (49 U. S. C. §1) (R. 40). Therefore, judgment and order of the District Court were reversed (R. 40).

SUMMARY OF ARGUMENT.

The Interstate Commerce Act, which applies to common carriers engaged in the transportation of property by rail, and to such transportation, from any place in the United States to or from a foreign country "but only in so far as such transportation takes place within the United States," requires that charges for the transportation of property shall be just and reasonable, and prohibits every unjust and unreasonable charge (49 U. S. C. Sec. 1(1)(2)(5)).

The Interstate Commerce Commission made a finding that the freight rates charged for transportation of petitioner's shipments of potash from New Mexico to Canadian destinations were unjust and unreasonable, and awarded damages to the extent to which it considered such charges to be in excess of maximum reasonableness. The Commission based its decision upon a finding in another case that rates charged on contemporaneous shipments of potash from New Mexico to Detroit and Port Huron were unreasonable. Although the petitioner's shipments were from the same origins and crossed the border at Detroit and Port Huron en route to their destinations in Canada, the Commission refused to limit its reparation award to the measure of unreasonableness found to exist contemporaneously to the border crossings. Instead, the Commission in each case made a finding that the shipper was damaged to the extent to which an interim rate increase of 20% exceeded a sub-

sequent permanent maximum rate increase of $1.60 per ton fixed by the Commission, and was entitled to reparation in that measure. As a result of applying the same formula for computing damages on both the domestic and the international shipments, reparation on shipments terminating at Detroit was ordered in the amount of 62¢ per ton, but on petitioner's shipments which passed through Detroit to Toronto, reparation was awarded in the amount of 84¢ per ton, and on shipments going beyond Toronto to Montreal, reparation was awarded in the amount of $1.28 per ton.

Respondents contended that the reparation award was beyond the scope of the Commission's territorial jurisdiction by the extent to which it exceeded what the Commission had determined to be a maximum reasonable rate for that part of the transportation performed within the United States, that is, from the New Mexico origins to the border crossings at Detroit and Port Huron. The position of the respondents was upheld by the court below.

Petitioner relies principally upon the decisions in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931), both of which recognized jurisdiction of the Commission to award damages for unreasonableness in a joint international rate without deduction of a share of the charges attributable to transportation within a foreign country. The instant case is distinguishable because it involves the unusual circumstance of the Commission itself having made a determination of a maximum reasonable rate between the New Mexico origins and the border points through which the Canada Packers shipments passed en route to the destinations in Canada.

Awarding a greater measure of damages in connection with the Canada Packers shipments than in connection with the Detroit shipments, where the former differed only in

that additional transportation was performed beyond the international boundary, identifies the award as an attempt by the Commission to regulate rail transportation within Canada. The award cannot be deemed to relate only to transportation within the United States, for the Commission expressly found that the measure of unreasonableness in the charges from New Mexico to Detroit was 62¢ per ton, and the Commission cannot hold contemporaneously that the charges from New Mexico to Detroit were unreasonable by 62¢, 84¢, and $1.28. The difference between the 62¢ award and the 84¢ and $1.28 awards can be explained only as a measure of the unreasonableness the Commission found to exist for transportation beyond Detroit, which was transportation within Canada.

The decision of the Court of Appeals thus properly restricts the Commission's award within the jurisdictional confines of Section 1 of the Interstate Commerce Act (49 U. S. C. § 1). Its judgment should be affirmed.

ARGUMENT.

I.

The Interstate Commerce Commission, in Awarding Damages on Account of Unreasonable Freight Charges for Railroad Transportation of Potash From New Mexico, Cannot Penalize Carriers to a Greater Extent on International Shipments Moving Into Canada Than on Contemporaneous Shipments Traversing Only the United States Portion of Such Routes Where a Maximum Reasonable Rate Had Been Prescribed for That Portion.

Canada Packers (Br. 11-15) asserts that the issue presented is not novel and was resolved by the Court in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931). Respondents submit, however, that the question presented has not been considered heretofore in the courts, even though the determinative territorial limitation provisions of Section 1(1) and (2) of the Interstate Commerce Act (49 U. S. C. § 1(1)(2)) have been in effect since 1920.[7]

Section 1(1) and (2) of the Interstate Commerce Act (49 U. S. C. § 1(1)(2)) provides that the provisions of Part I of the Act shall apply to transportation of property "only in so far as such transportation takes place within the United States . . ." Section 1(5) (49 U. S. C. § 1(5)) requires that charges for the transportation of property "shall be just and reasonable" and prohibits every "unjust and unreasonable" charge.

7. See *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 620-621 (1945).

In both of the cases relied upon by petitioner, it was held that a shipper was entitled to reparation on account of unreasonableness of a joint international rate. However, in neither of these cases did the record disclose the existence of a maximum reasonable rate for that part of the transportation that was performed in the United States. Hence there was no basis, in fixing damages, for making a deduction on account of transportation performed beyond the international border.

Thus, in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179, 187 (1927), involving a joint international rate from a point in Canada to a point in the United States, the Court pointed out:

> "The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of."

Similarly, in *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660, 661-662 (1931), in discussing a joint international rate from a point in Mexico to a point in the United States, the Court declared:

> "The Act does not empower the Commission to prescribe or regulate such rates. It applies to international commerce only in so far as the transportation takes place within the United States. The Act applied to the transportation of the cow peas from the boundary to destination and required defendant to establish just and reasonable rates for that service. And defendant was liable to shippers for damages resulting from its failure so to do. §§ 1(1)(c), (2) and (5), 6(1), (7) and 8.
>
> • • • • •
>
> "While the Act does not govern the joint through international rate, the demand for reparation is grounded upon the claim that the maintenance of that rate participated in by the American carrier and its violation of the Act, in failing to maintain a just and rea-

sonable rate for the transportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate."

In the instant case, however, as the Court of Appeals pointed out (R. 38), the Interstate Commerce Commission itself, in *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 300 I. C. C. 87 (1957), had made a finding as to maximum reasonable rates on potash from the origins in New Mexico to the border crossings at Detroit and Port Huron retroactively to the very period of time within which petitioner's shipments moved. This case, therefore, unlike either *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), or *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931), involves the unusual circumstance of the Commission having made a determination of a just and reasonable rate between the New Mexico origins and the border points through which the Canada Packers shipments passed en route to their destinations in Canada. Awarding a greater quantum of damages in connection with the Canada Packers shipments, where those shipments differed only because additional transportation was performed beyond the Canadian border, clearly identifies the award as an attempt by the Commission to regulate rail transportation within Canada, in violation of Section 1 of the Interstate Commerce Act (49 U. S. C. § 1). That section explicitly confines the Commission's jurisdiction "only in so far as such transportation takes place within the United States."

Petitioner's brief (p. 15) quotes from the decision below the comment that (R. 39): "In the case at bar, rates from New Mexico to the border points were in effect and hence this case is not governed by *News Syndicate.*" Respondents submit that this quotation must be viewed in its context, since the court below was careful to identify such rates to the border points as rates that had been pre-

scribed by the Commission as maximum reasonable rates (R. 38). A reading of the entire opinion demonstrates that the Court of Appeals distinguished the factual situation from the *News Syndicate* case because here it was shown that the Commission itself had prescribed maximum reasonable rates for the part of the transportation that was performed within the United States.

Petitioner has emphasized (Br. 14-19) that in the *Lewis* case the Court pointed out that the existence of a rate (not shown to be just and reasonable) covering transportation between the international boundary and the destination in the United States was insufficient to excuse the carrier involved from an award of reparation covering the through international transportation. Here, however, the situation is markedly different, for the Court of Appeals has required the Commission, in computing damages in connection with charges assessed against an international shipment, to observe the same standard which the Commission itself had established as proper for computing damages in connection with charges assessed against contemporaneous shipments traversing only the United States portion of such routes. Neither respondents nor the court below have contended that the maximum reasonable rates prescribed by the Commission from Carlsbad and Loving to Detroit and Port Huron are applicable *per se* to the Canada Packers shipments, and, it is submitted, petitioner's argument (pp. 17-19, 21-22) regarding applicability of rates is not pertinent to the issue here. The real issue is whether, in computing damages in the light of the unusual factual context presented, the Commission observed a standard consistent with its limited territorial jurisdiction.

Petitioner has argued that respondents "are liable for the full amount of damages regardless of the proportion of the excess charges which may be attributable to any single railroad or group of railroads" (Br. 20), citing *Louisville*

& Nashville Railroad Co. v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217 (1925). That decision constitutes a recognition of the fact that liability to pay reparation in connection with a domestic joint through rate is joint and several, and is not pertinent to the issue of how reparation should be computed where a joint international rate is involved.

Petitioner has pointed out, referring to *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), and *International Nickel Co.* v. *Director General*, 66 I. C. C. 627 (1922), instances in which reparation has been awarded in connection with unreasonable joint international rates without regard to the portion of the through charge that is attributable to transportation performed within the United States. Nevertheless, in all such cases other than the instant case, there was no evidence of a maximum reasonable standard covering the domestic leg of the through transportation, and in the absence of such standards the Commission itself has called attention to the practical difficulty of finding only a portion of a joint international rate unreasonable. See *Black Horse Tobacco Co.* v. *Illinois Central Railroad Co.*, 17 I. C. C. 588, 590 (1910); *Citizens Gas & Coke Utility* v. *Canadian National Railways*, 325 I. C. C. 527, 530, 531 (1965). No such practical problem exists, of course, where the Commission has fixed a contemporaneous standard of reasonableness for the domestic leg.

II.

The Commission, in Awarding Damages on Account of Unreasonable Freight Charges, Cannot Award Different Measures of Damages Where the Only Difference Between Shipments Is the Amount of Transportation Performed Within a Foreign Country.

Canada Packers has interpreted the decision of the Court of Appeals as establishing that "the domestic rates would serve as the maximum measure of the injury to a shipper who was compelled to pay unreasonably high joint through rates" (Br. 22). Petitioner's statement is correct, assuming, of course, that the domestic rates referred to as a standard consist of rates prescribed by the Commission as contemporaneous maximum reasonable rates. Petitioner, however, is not satisfied with such a standard, contending that (Br. 22) "the shipper has been injured, but under the Court of Appeals' decision it would be an injury for which the law provides no remedy."

Canada Packers apparently wants the Commission to be able to continue, as attempted here, to award damages on account of allegedly unreasonable freight charges even where such charges clearly are identifiable as pertaining to transportation performed within a foreign country and the shipper also has been awarded damages for the domestic portion of such transportation according to the same standard fixed as appropriate for domestic shipments.

The far-reaching nature of petitioner's demands can be emphasized by discussing specific examples. As pointed out previously, the Commission found, in *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 300 I. C. C. 87 (1957), that at the time petitioner's shipments moved the maximum reasonable rate which the carriers could charge on potash from Carlsbad to Detroit was $12.70

per ton, and the Commission awarded reparation in the amount of 62¢ per ton since the carriers had assessed a rate of $13.32 per ton (R. 30, 38). The damages were computed on the extent to which an interim rate increase of 20%, authorized by the Commission to be effective during the period January 5 through May 5, 1948, exceeded a maximum rate increase of $1.60 per ton fixed by the Commission as effective May 6, 1948 (R. 11-12). In its consideration of the charges assessed against the Canada Packers shipments, the Commission, citing its *Consolidated Rendering* decision as authority and applying the same reparation formula (the extent to which the 20% interim increase exceeded a final maximum increase of $1.60 per ton), held that the rate of $14.64 which the carriers assessed on the shipments that moved from Carlsbad to Toronto and Welland, Ontario via Detroit[8] was in excess of a maximum reasonable rate of $13.80, and awarded reparation for the difference, 84¢ per ton (R. 14-15, 29-30, 37-38). Obviously, by awarding reparation in the amount of 62¢ per ton on shipments that terminated at Detroit and in the amount of 84¢ per ton on shipments that crossed the international boundary at Detroit and terminated at Toronto, the Commission was awarding 22¢ per ton damages attributable solely to transportation performed in Canada by Canadian railroads.

Furthermore, the Commission attempted to escalate the damages in direct proportion to the amount of additional transportation performed within Canada. For example, in those instances in which petitioner's shipments crossed the border at Detroit and went beyond Toronto to Montreal, the Commission awarded damages not merely to the extent

8. All of the Canada Packers shipments crossed the border at either Detroit or Port Huron. Since rates from both Carlsbad and Loving are identical to both points, for reasons of convenience only Carlsbad and Detroit are referred to in the examples discussed (R. 27, 30).

of 62¢ per ton (as at Detroit), or even 84¢ per ton (as at Toronto), but in the much greater sum of $1.28 per ton (R. 29-30, 37).[9] Yet, manifestly, the only difference between the shipments terminating at Toronto and those terminating at Montreal consists of the additional transportation service *within Canada* received by the latter. Clearly such an award is outside the scope of the Commission's territorial jurisdiction as prescribed in Section 1 of the Interstate Commerce Act (49 U. S. C. §1).

Petitioner has argued that the Canadian railroads were not indispensable parties to this action (Br. 22-23). Respondents do not believe such an issue is before the Court. Nevertheless, as the Court of Appeals pointed out, the incongruous effect of the Commission's award, if enforced in the manner sought by Canada Packers, would require United States railroads "to pay reparation to a Canadian consignee on account of freight charges received for transportation performed within Canada by Canadian railroads" (R. 40).

III.

The Decision of the Court of Appeals Protects Carriers From Arbitrary Changes in the Commission's Standards of Reasonableness for the Same Measure of Transportation.

Petitioner's concluding argument (Br. 23-24) is to the effect that respondents should be required to pay the full amount of reparation fixed by the Commission because of their failure to establish just and reasonable rates appli-

9. On shipments to St. John, New Brunswick, which also crossed the border at Detroit, damages awarded were nearly treble those on the Detroit shipments, 180¢ per ton versus 62¢ per ton (R. 30, 37). The St. John shipments re-entered the United States at Megantic, Quebec and recrossed the border at Vanceboro, Maine (R. 27).

cable on international commerce in so far as the transportation takes place within the United States. Respondents submit that under the circumstances of this case respondents were excused from any such responsibility by the Commission's own action in establishing a maximum reasonable standard for transportation between the United States origins and the border crossings.

In effect, what the Commission has done is to reject its own standard of reasonableness. The Court, in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U. S. 370, 390 (1932), held that the Commission cannot, in awarding reparation in connection with a domestic rate, ignore its prescribed maximum reasonable standard between the points involved. Here the Commission would disregard such a standard merely because the shipments involved traversed additional distances in a foreign nation.

The reparation award cannot be construed to relate only to transportation within the United States, for the Commission expressly found that the measure of unreasonableness in the charges from Carlsbad to the border, Detroit, was 62¢ per ton. It would be contrary both to logic and to law to assert that the Commission can hold contemporaneously that the charges from Carlsbad to Detroit were unreasonable by 62¢, 84¢, and $1.28. The only way to explain the difference between the 62¢ award and the 84¢ and $1.28 awards is that the latter two are a measure of the unreasonableness which the Commission found to exist for the hauls beyond Detroit. The decision of the Court of Appeals thus has the effect of restricting the Commission's award of damages within the confines of Section 1(1) and (2) of the Interstate Commerce Act (49 U. S. C. § 1 (1) (2)) as construed in *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 621 (1945), in which the Court stated:

"These decisions simply meant that whatever power

Congress might have to regulate the conduct of its domestic companies doing business abroad, it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation within foreign countries."

IV.

The Commission's Arguments Are Not Germane to the Issue of the Jurisdiction of the Commission to Require Reparation Based Upon an Entire International Joint Rate Where the Commission Also Had Made a Finding of Maximum Reasonableness Between the United States Points Involved.

The Interstate Commerce Commission has submitted a brief as *amicus curiae* pursuant to Rule 42 of the Rules of this Court.

The Commission has described the decision of the Court of Appeals as holding that "since the domestic railroads had on file rates from the involved origins to points on the international boundary, a just and reasonable level of such domestic rates affords the maximum guide in awarding damages to the shipper" (Br. 2-3, 19). Respondents submit that there is no issue of rates from the involved origins to the border being "on file," but rather that the decision of the Court of Appeals rested on the fact that the Commission had prescribed what it considered to be maximum reasonable rates from the involved origins to the border points through which petitioner's shipments passed (see pp. 12-13, *supra*).

The Commission has placed considerable stress (Br. 11-14) on what is described as a consistent line of Court and Commission decisions recognizing the jurisdiction of the Commission to require reparation based upon an entire joint rate between the United States and Canada. Such

a line of decisions is not relevant here since in none of the cases discussed was an issue presented in which, as here, the Commission had made a contemporaneous finding of a maximum reasonable rate between the United States points involved. Furthermore, *H. K. Porter Co.* v. *Central Vermont Railway*, 366 U. S. 272, 274 (1961), one of the cases relied upon by the Commission (Br. 13), involved neither a finding of unreasonableness nor an award of damages.

It is asserted that the Commission has not "directly interfered with the jurisdiction of any foreign government" (Br. 13-14). Nevertheless, the Commission surely has attempted to regulate matters outside its own territorial jurisdiction by the technique exercised herein, *i.e.*, penalizing carriers to a greater extent on shipments moving into Canada than on contemporaneous shipments traversing only the United States portion of such routes, with the penalties made progressively more severe in relation to the quantity of transportation that took place within Canada (see pp. 15-17, *supra*).

Much of the Commission's brief consists of criticism of the position advanced by the United States to the effect that the proper measure of damages to be awarded by the Commission is the amount by which the division of the joint rate actually received by the American carrier exceeds the maximum reasonable rate for the American leg of the trip, as determined by the Commission (Br. 4, 16-18). The Commission's criticism of this position rests upon a belief that such a method of computing damages is "improper and unworkable" (Br. 4) and that divisions may be useful, but "are not conclusive" evidence of reasonableness of the rates charged (Br. 17). Respondents submit that the technique proposed by the United States might not be as burdensome and unworkable as suggested, for the Commission upon occasion has considered separate divisions received by either Canadian carriers or

American carriers in resolving questions of reasonableness involving international joint rates; see *International Paper Co.* v. *Delaware & Hudson Co.*, 33 I. C. C. 270, 274 (1915); *Carlowitz* v. *Canadian Pacific Railway Co.*, 46 I. C. C. 290, 292 (1917); *Sulphur, Canadian Origins to East St. Louis, Ill.*, 326 I. C. C. 288, 293, 317 (1966).

The Commission has suggested, alternatively, that "if the railroads have evidence that conditions in Canada require relatively higher rates, they should present such evidence to the Commission for its consideration" (Br. 17). Such an approach, of course, disregards questions of the Commission's jurisdiction to award reparation respecting charges for transportation performed within Canada and, in addition, improperly would put the burden of proof upon defending railroads to show that rates were not unreasonable rather than upon complaining shippers to prove unreasonableness; see *Pittston Paper Corp.* v. *Canadian National Railway Co.*, 165 I. C. C. 141, 144 (1930); *Conrad Fafard, Inc.* v. *Canadian National Railways*, 302 I. C. C. 163, 166 (1957).

The Commission has emphasized an alleged acquiescence upon the part of American railroads in the Commission's practice of awarding reparation by reason of unreasonable joint international rates without regard to the extent of the transportation performed beyond the border (Br. 11, 18). Respondents do not know whether or not such an assumption is valid generally, but it seemingly is invalid as far as the instant factual situation is concerned. As far as can be determined no previous litigation has involved the validity of a reparation order which fails to take into account that portion of the charges paid for transportation beyond the border where the Commission itself has established a contemporaneous maximum reasonable standard on like traffic moving between the same United States origin and the border crossing. For the same reason, the Com-

mission need not be apprehensive that affirming the decision of the Court of Appeals would be tantamount to "reversal of the long-standing decisions of this Court governing international rates" (Br. 19). The decisions relied upon by the Commission are distinguishable from the present case, for only the latter involves a situation in which the Commission had undertaken to establish a maximum reasonable standard of rates on the same traffic traversing only the United States portion of the international routes.

V.

It Is Not Necessary for the Court to Reexamine Its Decisions in Order to Resolve the Issue Presented, but Even if the Court Should Reexamine and Modify Such Decisions, the Result Here Would Not Differ in Substance From the Decision Below.

A brief as *amicus curiae* also has been filed by the United States, acting independently of the Interstate Commerce Commission. The position of the United States is in substantial conflict with the positions of petitioner and of the Commission, and is somewhat closer to the position of the respondents. Thus the United States is in accord with the view of the Court of Appeals and respondents that the Commission exceeded its territorial jurisdiction, but considers the decision below to rest "on questionable premises" (Br. 13).

The differences in the positions of the United States and the respondents are traceable primarily, it appears, to a somewhat different conception of the question presented herein. The United States describes the question presented in the following language (Br. 4):

> "Section 1(1) of the Interstate Commerce Act provides that the Interstate Commerce Commission has

> no power to regulate rail transportation outside of the United States. The basic question presented, in the view of the United States, is whether, when an American railroad establishes with either a Canadian or a Mexican railroad a joint through international rate, the Commission may find the rate to be unjustly and unreasonably high in its entirety, determine the maximum reasonable rate, and award a complaining shipper the difference as reparations. A subsidiary question is whether, and to what extent, the amount of reparations in such a case is limited by a prior Commission determination of the maximum reasonable rate that the American carrier may charge for a shipment to the place where shipments traveling under the joint through international rate cross the international border."

What the United States describes as "a subsidiary question" is, in the view of respondents, the basic question, so that it is not necessary for the Court to consider what the United States identifies as "the basic question presented." In other words, since the Commission had already made a determination of the contemporaneous maximum reasonable rate from Carlsbad and Loving, the origins, to Detroit and Port Huron, the border crossings, it appears unnecessary for the Court to determine whether the Commission would have had jurisdiction to award damages for the entire international charges from Carlsbad and Loving to the Canadian destinations if it had not made such determination of reasonableness for the rate to the border.

Insofar as the Canada Packers factual situation is concerned, it is the view of the United States that the Commission should have determined the maximum reasonable proportional rates for the American portions of these shipments and awarded Canada Packers the difference between a charge so computed and the divisions (if greater) received by the American railroads from the joint through

rates under which the shipments moved (Br. 33). It is respondents' position that this is compatible with the manner in which respondents observed the requirements of the reparation award (R. 32).

The United States, however, differs with the position of the respondents by contending that the rate prescribed as a maximum reasonable rate from Carlsbad to Detroit is not necessarily determinative of a maximum reasonable United States proportion of a rate from Carlsbad via Detroit to Toronto, for example, and urges that the matter be referred to the Commission for determination of this narrow question (Br. 34-35).

Respondents submit that it is unnecessary to refer such a question to the Commission for a redetermination. No better proof of the measure of unreasonableness of the American portion of the joint international rate could be found than a specific finding by the Interstate Commerce Commission of what a contemporaneous maximum reasonable charge should be for the American portion of the international shipments, and that determination was made by the Commission in *Consolidated Rendering Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 300 I. C. C. 87 (1957). In fact, not only did the *Consolidated Rendering* case contain findings as to maximum reasonable rates to the border crossings, but that decision was relied upon by the Commission here as its direct authority for a finding that the joint international rates were unjust and unreasonable to the extent that certain general rate increases temporarily authorized by the Commission were later found excessive (R. 9-18).

Furthermore, the Commission utilized a formula for computing reparation that was identical to the formula employed for computing reparation in the *Consolidated Rendering* case. Thus, in the *Consolidated Rendering* case

damages on charges for transportation from Carlsbad to Detroit were computed on the extent to which an interim rate increase of 20%, effective for the period January 5 through May 5, 1948 (during which period the Canada Packers shipments were transported) exceeded a maximum rate increase of $1.60 per ton, effective May 6, 1948 (R. 11-12). Then, in computing its reparation award to Canada Packers, the Commission, relying upon the authority of the *Consolidated Rendering* case, stated plainly that it was following the same formula, i.e., the extent to which the 20% interim increase exceeded the final maximum increase of $1.60 per ton on charges for transportation from Carlsbad via Detroit to Canadian destinations (R. 14-15).

Therefore, it is unnecessary to refer again to the Commission the question of determining a maximum reasonable charge for transporting potash from New Mexico to the international border for the period January 5 through May 5, 1948.

Respondents recognize the possibility that the Court will view the question presented in the broad terms described by the United States (Br. 4). In the event that the Court considers it necessary to resolve the basic question as thus presented, respondents agree with the view of the United States that the plain meaning of the territorial limitations of Section 1 of the Interstate Commerce Act (49 U. S. C. § 1) is that "the Commission has no power to determine what is a reasonable charge for a transportation service performed partly within a foreign country, and hence no power to determine, for reparation or other purposes, when a joint through international rate or a combination of proportional rates for an international rail shipment—in either case a charge involving foreign transportation—is unlawful" (Br. 11-12). See *United States* v. *Pennsylvania Railroad Co.*, 328 U. S. 612, 621 (1945).

The United States concedes that, for its position to be upheld, it will be necessary for the Court to reexamine, and modify substantially, its decisions in *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927); *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654 (1931); and *Great Northern Railway Co.* v. *Sullivan*, 294 U. S. 458 (1935) (Br. 21, 26, 35).[10] Respondents do not disagree with the convincing arguments advanced by the United States in support of its contention that the decisions referred to above should be modified substantially (Br. 14-26, 35-36).

The United States also has advanced the proposition that, assuming the Commission has no authority to determine maximum reasonable rates for an international through shipment, the proper measure of damages due by the domestic carrier on a joint through international shipment is the amount by which the division of the joint rate actually received by the American carrier exceeds the maximum reasonable rate for the American leg of the trip, as determined by the Commission (Br. 26-33). Respondents affirm that their method of compliance with the Canada Packers reparation order is in accord with the requirements of Section 1 of the Interstate Commerce Act (49 U. S. C. § 1) (R. 32). Nevertheless, assuming that the United States is correct in its contention that the Commission has no authority to determine maximum reasonable rates for an international through shipment, respondents do not quarrel with the proposal of the United States that, where the Commission prescribes a maximum reasonable rate for the American leg of an international shipment, the shipper is entitled to an award of damages only to the extent to which that maximum reasonable charge is exceeded by the division retained by the American carriers.

10. See also *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 620 (1945) (footnote 9).

Such a procedure appears to be within the scope of the territorial limitations of Section 1 of the Interstate Commerce Act (49 U. S. C. § 1), and its practical results seemingly would not differ substantially from the results of the course of action followed here by the respondents.

CONCLUSION.

For the foregoing reasons, respondents submit that the petitioner is not entitled to additional damages clearly attributable, within the unique circumstances presented, to the allegedly unreasonable charges for transportation performed within Canada. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

HARVEY HUSTON,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Respondents.

FLOYD STUPPI,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Of Counsel for Respondents.

October 1966.

PROOF OF SERVICE.

I, Harvey Huston, attorney for respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of October, 1966, I served the foregoing brief as follows:

On petitioner by mailing a copy, properly addressed, with first-class postage prepaid, to Charles B. Myers, 611 Field Building, Chicago, Illinois, 60603;

On the United States by mailing copies, properly addressed, with air mail postage prepaid, to each of the following: Thurgood Marshall, Solicitor General, Donald F. Turner, Assistant Attorney General, Richard A. Posner, Assistant to the Solicitor General, Robert B. Hummel, Attorney, and John T. Marshall, Attorney, Department of Justice, Washington, D. C., 20530;

On the Interstate Commerce Commission by mailing copies, properly addressed with air mail postage prepaid, to Robert W. Ginnane, General Counsel, and Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission, Washington, D. C., 20423.

HARVEY HUSTON.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CANADA PACKERS, LIMITED,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

CHARLES B. MYERS,
611 Field Building
Chicago, Illinois 60603
Attorney for Petitioner

McCORMICK & HENDERSON, INC., CHICAGO, ILL.

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PETITIONER'S REPLY BRIEF

In addition to petitioner's opening brief on the merits and respondents' answering brief, two *amicus curiae* briefs have been submitted for the Court's consideration. The *amicus curiae* brief of the United States advocates radical changes in the existing law respecting the Interstate Commerce Commission's jurisdiction to award damages on international shipments and urges repudiation of this Court's

decisions in *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179; *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654; and *Great Northern Ry.* v. *Sullivan*, 294 U.S. 458. Adoption of the government's position would take from the Commission a power which it has consistently exercised since 1910.

Responding to this challenge, the Commission has filed an *amicus curiae* brief stating strong opposition to the position of the United States. That response to the government is a comprehensive and persuasive defense of its long settled jurisdiction to award damages on international traffic. Petitioner is in full agreement with the Commission's presentation and, to avoid repetition, confines its reply to such additional comments as it believes necessary to emphasize the weakness and impracticability of the government's contentions and recommendations.

The first portion of this brief will be devoted to answering the arguments advanced by respondents in their brief on the merits. The second section is in response to the representations of the United States.

I.

REPLY TO RESPONDENTS' BRIEF

News Syndicate and Lewis are not distinguishable.

At the very outset of their argument (Br. 11) respondents concede that in both of the cases relied upon by petitioner, i.e., *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654, "it was held that a shipper was entitled to reparation on account of unreasonableness of a joint international rate."

Respondents attempt to distinguish the present case from *News Syndicate* and *Lewis* on the ground that the records in those two proceedings did not disclose, as allegedly this record does, the existence of a Commission prescribed maximum reasonable rate for that part of the through transportation that was performed in the United States. Here, respondents contend, the Commission had such information from its own decision in *Consolidated Rendering Co.* v. *Atchison, T. & S.F. Ry. Co.*, 300 I.C.C. 87 (1957) where it prescribed the maximum reasonable rates on potash from Carlsbad and Loving, New Mexico, to Detroit and Port Huron, Michigan, the border points through which petitioner's shipments moved en route to Canada.

Petitioner urges that the distinction relied on by respondents is without legal significance and that this case is controlled by *News Syndicate* and *Lewis*. Those decisions make it clear that railroads are required by Section 1 of the Interstate Commerce Act to establish and maintain just and reasonable rates between points in the United States and the international boundaries. The railroads' failure to maintain such rates was a violation of the Act and compelled the shippers to pay the excessive joint through rates. The Court held that in such circumstances the Commission had jurisdiction to determine the reasonableness of the joint through international rates to ascertain the extent of the shippers' damages (275 U.S. 179, 187; 283 U.S. 654, 659).

In the present case, as in *News Syndicate* and *Lewis*, the railroads failed to establish and maintain just and reasonable rates for the transportation between points in the United States and the international boundaries, and as a consequence petitioner was compelled to pay the excessive joint through rates. Although respondents have expressly

agreed that the joint through international rates charged on petitioner's shipments were properly applicable on this traffic (Stipulation, para. 6; R. 26) they insist that petitioner's damages must be measured by the domestic rates to Detroit and Port Huron prescribed by the Commission in the *Consolidated Rendering* case (300 I.C.C. 87).

Respondents' argument is essentially identical to the contention made by the railroad defendants in *Carstens Packing Co.* v. *Great Northern Ry. Co.*, 264 I.C.C. 164 (1945). That case involved joint through rates from Canada to points in the United States. The railroads argued that where the Commission had prescribed the maximum reasonable rates for the American portion of the haul there could be no violation of the Act and, hence, no grounds for damages. The following language from page 170 of that report is pertinent here:

> Defendants challenge the jurisdiction of the Commission over the rates assailed. They submit that by establishing local rates from the gateways on the basis prescribed in *Livestock—Western District Rates, supra,* they have met their obligation under the Interstate Commerce Act. Their position, in substance, is that there has been no violation of the act for which damages may be awarded, in support of which they cite *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U.S. 654. In *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 I.C.C. 139, 143, concerning the merits of a similar contention, division 4 said:
>
> > We have jurisdiction to determine the lawfulness of the joint rates applied, irrespective of whether or not local rates, as such, were published and maintained for transportation within the United States to the Canadian border. *Lewis-Simas-Jones Co.* v. *Southern Pac. Co., supra.*

It is clear from the foregoing decision that the prescribed local rates were not applicable on the through shipments and that the Commission, relying on the *Lewis* case, correctly decided that it had jurisdiction to determine the lawfulness of the joint through rates and the amount of the shipper's damages without regard to the measure of the local rates. The fact that the railroads published and maintained rates on local shipments originating at the border was irrelevant because those rates did not apply to and were not the rates charged on the international shipments. This Court discussed this question of local versus joint through rates, at page 663 of the *Lewis* case:

> A carload shipment "originating" at Nogales (Arizona) or at the point where the line of the foreign carrier and that of the defendant touch the boundary or in defendant's railroad yard adjacent to the boundary clearly must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier. The former covers local transportation only and involves two terminal services, one at Nogales, the point where received from the shipper, and the other at San Francisco, the place where delivered to the consignee. The latter involves the transportation of a through car from the point of connection and only the one terminal service at destination. It is manifest that a tariff limited, as is that described in the findings, to shipments so originating on defendant's line does not *apply* to the American part of the transportation of an international shipment on a through bill of lading. (Parenthetical matter and emphasis added.)

Petitioner submits that the *Carstens* and *Lewis* decisions dispose of respondents' argument (Br. 18) that they are not responsible for the full reparation award because they were "excused from any such responsibility by the

Commission's own action in establishing a maximum standard for transportation between the United States origins and the border crossings."

The court below failed to understand the concept that only one rate, in this case the joint through rate, can be applicable on a given shipment. Despite the stipulation between petitioner and respondents that "On all these shipments defendants assessed the applicable single-factor, joint through rates from the mentioned United States origins to the described destinations in eastern Canada . . . ." (R. 26), the lower court held that this case was not governed by the *Lewis* case because respondents had met the burden of proving rates from New Mexico to the border points (R. 40). Since the joint through rates applied, the fact that respondents maintained rates to the border, was immaterial.

It is evident that the lower court misconstrued the *Lewis* decision because it attempted to distinguish that case from the case at bar by referring to the Court's observation (quoted above from page 663) that the tariff there involved did not purport to apply to the American part of the international transportation and that the railroad had failed to show that it maintained a rate from the border as required by the Act (R. 39, 40). Here, the parties had eliminated that question by agreeing that the joint through rates were applicable. None the less the Court of Appeals concluded that the railroads had met the burden of proving rates from the New Mexico origins to the Canadian border points.

Respondents argue (Br. 13) that neither they nor the court below have contended that the Commission-prescribed rates to Detroit and Port Huron "are applicable *per se*

to the Canada Packers shipments . . .'' and they contend that petitioner's argument regarding the applicability of rates is not pertinent to the issue here. Petitioner urges that the question of applicability is the substance of this case.

Detroit rates do not represent American portion of through transportation.

Another defect in the respondents' position is the assumption that the New Mexico to Detroit rates represent American portion of the through transportation (Br. 12, 14, 18). The assumption is unfounded because the rates on shipments terminating at Detroit include the cost of a terminal delivery at Detroit which is a service not required nor accorded the Canada Packers shipments. Those shipments were simply interchanged with a connecting carrier at the border crossing. As noted above, this Court recognized the distinction in service between a shipment terminating or originating at the border crossing and a shipment moving in joint through service.

Petitioner submits that the rate to Detroit reflects something more than just the American portion of the through transportation for it has built into it an amount representing the cost incurred by the American carriers in performing the delivery service at Detroit. Even under respondents' theory it would not be proper to charge petitioner with this element of cost.

Respondents, in arguing that the rates to Port Huron and Detroit represent the American portion of the through transportation, overlook the fact that the rates to Canada are on a higher level than the rates to American destinations of comparable distance. More precisely, the rates

to Canadian destinations were based on the American rates for comparable distances until 1943 when the Commission, in its Docket 29202, held the American rates unreasonably high and required reductions therein. Prior to that proceeding the rates to Welland and Toronto were the same as to Buffalo, New York. The rate to Montreal was related to the rates to New York and Boston (R. 16).

As a result of the Commission's decision in Docket 29202, the rate to Buffalo was reduced 50 cents a ton, and the reduction to New York put that rate $1.80 below Montreal and the rate to Boston became $1.30 under Montreal. No similar reductions were made to the Canadian destinations, presumably because the Commission lacks the power to prescribe such rates for the future (R. 14, 16).

In reaching its decision in this case, the Commission considered the relationships between the American and Canadian rates and determined, as requested by petitioner, maximum reasonable rates which were higher to the Canadian destinations than to American destinations of comparable distances (R. 15, 16). To illustrate, the reparation rate prescribed by the Commission in *Consolidated Rendering* to Buffalo, New York, was $13.30 a ton. The reparation rate determined by the Commission in this proceeding to Welland and Toronto—points that are intermediate to Buffalo—was $13.80 or 50 cents a ton higher than the rate to Buffalo. The same relationships were carried out with respect to the other American and Canadian destinations (See Table II at R. 15).

When respondents complain (Br. 16-18) that the Commission allowed petitioner reparation of 84 cents per ton on shipments to Toronto and thereby penalized them to the extent of 22 cents when compared with the 62 cents reparation award on shipments terminating at Detroit,

they completely ignore the fact that the Toronto rate is 50 cents higher than their rate for service to the comparable American point at Buffalo. Respondents do not explain why this 50 cents should not be taken into account when measuring the maximum reasonable rate from New Mexico to the border points. Certainly they cannot deny that petitioner has paid relatively more for its service than the service accorded consignees located at the border points. The fact is there is no penalty and respondents are enjoying substantially greater revenues on shipments to Canada than on comparable shipments to United States destinations.

The principal emphasis of respondents' argument relates to the rate situation to Detroit and Point Huron and the fact that all of petitioner's shipments moved through those points en route to Canada. The fact that Canada Packers' shipments happened to move through these border crossings is irrelevant. Petitioner was permitted under the tariff naming the joint through rates to have all of its shipments moved via the Buffalo, New York, gateway. In addition, shipments to Montreal were also authorized to move via Constable, New York. Shipments destined to St. John, New Brunswick, could also cross the border at Vanceboro, Maine (R. 27).

It is obvious that if the Commission's jurisdiction were limited as contended by respondents, shippers would seek out and use the border crossing nearest the shipment's Canadian destination. In the present case, the shipments to Toronto and Welland would have moved via Buffalo, New York, and shipments to St. John via Vanceboro, Maine. In the case of Montreal, shipments would have moved via the authorized gateway at Constable, New York. By so routing its shipments, petitioner would have been

assured (under respondents' theory) of having its reparation award measured in relation to the maximum reasonable rates to these other gateways rather than having it limited to the smaller amount which would have accrued if the shipments moved via Detroit. If this were the law, it would result in the virtual closing of the Detroit gateway on any traffic moving to Welland or Toronto and points in Canada east thereof. No use would be made of the Buffalo gateway on shipments to St. John and other points in eastern Canada—those shipments would route via Vanceboro, Maine. But petitioner asserts that this is not the law today nor was it the law at the time its shipments were made. The same argument which respondents urge respecting these shipments which moved in 1948 was considered and rejected by the Commission in its 1945 decision in *Carstens Packing Co.* v. *Great Northern Ry. Co.*, 264 I.C.C. 164, discussed earlier herein.

Arizona Grocery principle not involved.

At page 18 of their brief, respondents contend that the Commission has rejected its own standard of reasonableness by not limiting itself to the reparation award authorized in *Consolidated Rendering*. In support of that argument the railroads cite *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370. Manifestly, the decision is not authority for the proposition advanced by respondents. That case held, as respondents state, that the Commission may not award reparation in connection with a domestic rate when it previously prescribed the maximum reasonable rates later found to be unlawful. The obvious distinction between that case and the instant situation is that here the Commission did not prescribe maximum reasonable rates on these Canadian shipments and then subsequently order a lower basis and award repara-

tion for the differences in the rates. An equally apparent distinction is that the Commission did not prescribe the Detroit and Port Huron rates as the maximum reasonable rates for the American portion of the through haul, as contended by respondents. The citation is simply not in point.

Pennsylvania R. Co. does not support decision below.

Respondents also contend, at pages 18 and 19, that the Court of Appeals' decision restricted the Commission's award of damages within the confines of Section 1(1) and (2) of the Act as construed in *United States* v. *Pennsylvania Railroad Co.*, 323 U.S. 612. The language quoted by respondents from page 621 of that decision cannot be regarded as support for the lower court's conclusions when the cited language is read in connection with Footnote 9 at page 620. That footnote reference explains that while the Act does not empower the Commission to prescribe or regulate joint international rates, the Court has held that where such joint rates were voluntarily fixed and charged by an American railroad, the Commission had power given it by the 1920 Act to pass upon the reasonableness of the joint through international rate. This is all the power the Commission needed in the present case to enter its reparation order.

Louisville & N. R. Co. case is appropriate.

The remaining contention which petitioner feels deserves response is the argument (Br. 13, 14) that petitioner's reliance on *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, is improper because that case, which holds that connecting carriers are jointly and severally liable for any unlawfulness in a joint rate, involved domestic traffic. The attempt to discredit petitioner's citation can-

not succeed, for the Court in discussing and applying the general rule of liability of joint tort feasors in the *Lewis* case specifically relied on and cited the *Louisville* case as authority for its conclusion (283 U.S. 654, 660). The principle, contrary to respondents' effort at distinction, is fully applicable to international traffic as well as domestic shipments moving on joint through rates.

II.

REPLY TO THE SOLICITOR GENERAL

As indicated in the introductory paragraphs of this reply, the Interstate Commerce Commission has filed an *amicus curiae* brief in opposition to the views of the United States. Petitioner agrees with the Commission's presentation and adopts those arguments as its own with the additional observations which follow.

Infirmities of government's position.

The basic position of the Solicitor General (Br. 11) is that the Commission has no power to determine what is a reasonable charge for transportation service performed partly within a foreign country and, thus, no power to determine, for reparation or other purposes, whether the rates in question are lawful. The government's brief then goes on to suggest a method by which an American shipper can still obtain reparation for an unreasonably high joint through international rate. Under that suggestion the Commission would be required to determine the maximum reasonable proportional rate for the American segment of the through movement and if that "rate" exceeded the divisions received by the carrier the shipper would be entitled to the difference between the division and the maximum reasonable "rate" (R. 26).

Petitioner sees an immediate infirmity in that recommendation because there are many situations in which there would be no division of the through international rate. To illustrate, the New York Central System has a line of railroad running from the state of Michigan, through Canada, and back into the United States at Buffalo and beyond to other points in New York. A shipment from Kalamazoo, Michigan, to Rochester, New York, via the New York Central would move from Kalamazoo to Detroit, where it would cross into Canada, pass through Welland and other points in Ontario, re-enter the United States at or near Buffalo, New York, and proceed to destination at Rochester.

The situation is not unique to the New York Central. A number of other railroads operate into or through Canada in single-line service from American origins. For example, the Norfolk and Western Railway Company has lines from Kansas City, Missouri, to Buffalo, New York, via Detroit and the province of Ontario, Canada. Similarly, the Chesapeake and Ohio Railway Company has lines from points in Illinois and Michigan to Buffalo and Niagara Falls, New York, via Canada through Detroit and Port Huron.*

So far as petitioner is aware, there are no divisions of revenue within the same railroad company, and, therefore, there would be no basis on which the Commission could determine the amount of damages due the shipper under the government's suggestion because one of the critical elements of the formula is missing. This situation would also obtain with respect to that portion of the

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* A map of the Chesapeake and Ohio Railway Company's lines and maps of the other railroads referred to are found in the *Official Guide of the Railways*, October, 1966, issue, published by National Railway Publication Co., New York, New York.

Canadian National Railways' line from Duluth, Minnesota, to Canada via International Falls, Minnesota. A similar observation may be made regarding the Canadian Pacific Railway Company's lines in the state of Maine. Indeed, petitioner's shipments to St. John via the Canadian Pacific re-entered the United States near Megantic, Quebec, on the western boundary of Maine and were carried across the entire width of that state and re-entered Canada at Vanceboro, Maine, enroute to St. John (R. 27).

In this latter situation, the Commission would have to make two determinations. First, as to the maximum reasonable proportional rate to Detroit or other border crossing and, secondly, a determination of the maximum reasonable rate for the transportation through the state of Maine. Two such determinations would also be necessary in the illustration of the shipment from Kalamazoo, Michigan, to Rochester, New York. Further, a shipper complaining about the rate from Kalamazoo to Rochester would be in the unusual position of being required to file a complaint with the Commission against the New York Central for the two American portions of the haul and then bring a suit against that company in Canada for the Canadian portion of the transportation. In other words, the shipper would be required to bring two actions in different countries to obtain reparation from the same railroad defendant.

The Solicitor General asserts at page 19 of the government's brief that the Commission would appear ill-equipped to make determinations regarding the reasonableness of charges for foreign transportation and that it claims no expertise with respect to the costs and other conditions of such transportation. Petitioner submits that the Solicitor General overlooks the fact that the Commission has

been making such determinations for at least fifty years [*Black Horse Tobacco Co.* v. *Illinois Central R. Co.*, 17 I.C.C. 588 (1910)] and that it is intimately familiar with transportation conditions in Canada as indicated in its detailed recital of such conditions in its report in *Carstens Packing Co.* v. *Great Northern Ry. Co.*, 264 I.C.C. 164, as one illustration.

The Solicitor General goes on to argue that the Commission assumed in the present case that Canadian railroad conditions are so much like those in this country that a rate from the United States to Canada that exceeds the maximum reasonable rate for the same kind of shipment over a comparable distance completely within the United States must be unreasonably high. This contention is completely unfounded. The Commission's report very clearly shows that the rates to the Canadian destinations were substantially higher than those to the American destinations of comparable distances. Petitioner respectfully calls the Court's attention to the Commission's discussion, at R. 16, respecting the American and Canadian rates for comparable distances and to Table 2, at page 15 of the transcript of record. That table shows, for example, that the reparation rates to Welland and Toronto of $13.80 are 50 cents per ton higher than the rate to the more distant point of Buffalo.

Attention is respectfully directed also to the reparation rate of $18.60 to St. John, New Brunswick, a distance of 2,551 miles; as compared to the reparation rate of $17.10 to Caribou, Maine, a distance of 2,589 miles, and to the New York rate of $14.20 for 2,100 miles versus the Montreal rate of $16.00 for a slightly shorter haul of 2,075 miles. In no instance were the reparation rates on petitioner's shipments the same as to American destinations of comparable distances. Indeed, all of petitioner's rates

were higher—ranging from 50 cents to $1.80 per ton more than their American counterpart. Apparently the Solicitor General overlooked this part of the Commission's report.

The government indicates its interest in maintaining for the shippers and the carriers of the country the advantages inherent in joint through international rates (Footnote, Br. 36). Petitioner agrees that such rates are beneficial to the country's international commerce, but it foresees the decline of such rates if the position of the Solicitor General is adopted by the Court. If the Commission's jurisdiction is limited as the government contends and if a shipper, injured by the assessment of a joint through international rate, must prove the maximum reasonable proportional rate to or from the border crossing, there will be a strong demand by the shippers for proportional rates instead of the joint rates. American and Canadian carriers will be pressed to publish proportional rates so that the shipper can better ascertain which proportional rate is probably excessively high. This would aid him somewhat in deciding whether to sue in Canada or in the United States. It is likely, however, that he would have to bring actions in both countries to effect a full recovery.

Under the formula for determining the damages suggested by the Solicitor General, the railroads would be required to file with the Commission evidence of their divisions with their foreign connecting carriers. Over the years the railroads have jealously guarded the sanctity of their division sheets and have consistently refused to make them available to the shipping public. Whether the railroads as an industry are prepared or should be required to sacrifice this secrecy is a determination which, petitioner suggests, cannot be resolved from the information available to the Court in the briefs of these parties.

No need for new damage rule.

One final observation—and that relates to the right of the American carriers to limit their liability under joint through rates. The carriers are presently free to enter into joint rates if they so desire or they may meet their obligations under the Act by publishing rates between United States points and the international borders. The establishment of joint through rates is a matter of contract and the American carriers apparently have been successful in protecting themselves under such contracts against having to bear the foreign carrier's portion of a reparation award. As the *amicus curiae* brief of the Commission points out, there is no outcry by the American carriers for the kind of revision proposed by the Solicitor General. On the other hand, the adoption of his suggestions would put the shippers under the burden of bringing separate proceedings in the United States and in Canada to recover their full damages and without any appreciable advantage to the carrier defendants.

Conclusion

Petitioner respectfully submits that this case should be decided on the narrow issue presented by the lower court's decision and not on the broad grounds urged by the government. The Court of Appeals erred in holding that this case is distinguishable from *News Syndicate* and *Lewis* and that respondents had met their burden of proving rates from Mexico to the border points (R. 40).

Petitioner urges that the lower court's decision should be reversed and the judgment of the district court affirmed.

Respectfully submitted,

CHARLES B. MYERS,

Attorney for Canada Packers, Ltd., Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 11.—October Term, 1966.

Canada Packers, Limited, Petitioner, *v.* The Atchison, Topeka and Santa Fe Railway Company et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December 5, 1966.]

Per Curiam.

This case concerns the power of the Interstate Commerce Commission in reparations proceedings to determine the reasonableness of a joint through international freight rate. The American railroad respondents and their connecting carriers delivered 131 cars of potash from Carlsbad and Loving, New Mexico, to petitioner's plants in Canada. Petitioner was charged and paid a joint through international rate which it later attacked as unreasonable in a reparations proceeding before the Commission. Finding the rate to be unreasonable, the Commission ordered reparations in the amount of the difference between the rate charged and the rate which would have been reasonable at the time. Respondents refused to pay part of this amount on the theory that it represented an alleged over-charge for the Canadian leg of the trip over which the Commission had no jurisdiction under the applicable statute. This action followed in the District Court to collect the unpaid amount. The District Court found for the petitioner, the Court of Appeals reversed, 342 F. 2d 563, and we granted certiorari, 383 U. S. 906.

The provisions of the Interstate Commerce Act apply not only to transportation within the United States but

to transportation from or to any place in the United States to or from a foreign country "but only insofar as such transportation . . . takes place within the United States." 24 Stat. 379, as amended, 49 U. S. C. § 1 (1). The Court of Appeals held that the Commission in this case was without jurisdiction to determine the reasonableness of freight rates for transportation taking place in Canada and hence was without power to order reparations with respect to the Canadian portion of the trip. The respondents and the United States, the latter differing with the Commission in this case, take a similar view. As an original matter there might well be considerable merit in this position. But the contrary view of the Commission is one of long standing, see *Black Horse Tobacco Co.* v. *Illinois Central R. Co.*, 17 I. C. C. 588 (1910), and *Citizens Gas & Coke Utility* v. *Canadian Natl. Rys.*, 325 I. C. C. 527 (1965), and one which this Court has upheld on more than one occasion. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, squarely held that where a carrier performing transportation within the United States enters into a joint through international rate covering transportation in the United States and abroad, the Commission does have jurisdiction to determine the reasonableness of the joint through rate and to order the carrier performing the domestic service to pay reparations in the amount by which that rate is unreasonable. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, and *Great Northern Railway Co.* v. *Sullivan*, 294 U. S. 458, are in accord. The Court of Appeals and respondents would distinguish these cases, but we think the differences relied on are insubstantial. Indeed, the United States quite candidly requests that we reconsider these older cases and so narrow the powers of the Commission with respect to joint through international rates. It is not shown, however, that the long-standing construction of the statute by both

the Commission and this Court has produced any particularly unfortunate consequences and Congress, which could easily change the rule, has not yet seen fit to intervene. In these circumstances, we shall not disturb the construction previously given the statute by this Court, and the decision of the Court of Appeals must be

Reversed.

SUPREME COURT OF THE UNITED STATES

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[December 5, 1966.]

Mr. Justice Douglas, dissenting.

An Act of Congress gives the Interstate Commerce Commission jurisdiction over transportation from or to any place in the United States to or from a foreign country "but only insofar as such transportation . . . takes place within the United States." 24 Stat. 379, as amended, 49 U. S. C. § 1 (1). How that can be read, "Whether or not such transportation . . . takes place place within the United States" remains a mystery. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, actually decided something less. In *New Syndicate* there was a through rate from a point in Canada to New York City; but the carrier had failed to establish a rate from the international border to New York City. The Court refused to let the jurisduction of the Commission be defeated in that way and allowed it to determine the reasonableness of the through rate. 275 U. S., at 187. In the *Lewis-Simas-Jones* case the Court also emphasized that no tariff applicable "to the American part of the transportation of an international shipment on a through bill of lading" had been established "as required by the Act." 283 U. S., at 663. Those cases were ex-

plained in *Great Northern R. Co.* v. *Sullivan*, 294 U. S. 458, 462.

> "In each, shipments moved from an adjacent country into the United States on through rates made by joint action of the participating foreign and American carriers. The American carrier, having violated the Act by failure to file any tariff to cover its part of the transportation, collected freight charges found to be excessive and, as one of two or more joint tort-feasors, was held liable to the extent that the charges it exacted were in excess of what the commission ascertained to be just and reasonable. But here the charges collected were not excessive, and confessedly the same amounts lawfully might have been collected without injury or damage to plaintiff if only the connecting carriers had imposed the charges by means of 'joint' instead of the 'combination' through rates that they did establish."

In the present case rates from Carlsbad and Loving, New Mexico, to the Canadian border points had been established. 300 I. C. C. 87. The issues presented in *News Syndicate* and *Lewis-Simas-Jones* are therefore not offered here. *Stare decisis* is an important principle in dealing with statutory law,[1] though even then we

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[1] "The House of Lords no longer regards the reasoning in previous cases as sacrosanct. Witness its striking departure in *Public Trustee* v. *Inland Revenue Commissioners* [1960] A. C. 398, and *Midland Silicones Ltd.* v. *Scruttons Ltd.* [1962] A. C. 446. Those cases show that the House will not treat as absolutely binding any line of reasoning in a previous case which was not necessary to the decision: but will regard itself as at liberty to depart from it if convinced that it was wrong." *Penn-Texas Corp.* v. *Murat Anstalt* (1964) 2 Q. B. 647, 661.

And see (1966) 7 C. L. 251a:

"The Lord Chancellor made the following statement on July 26, 1966, on behalf of himself and the Lords of Appeal in Ordinary:

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application

have not always placed "on the shoulders of Congress the burden of the Court's own error." *Girouard* v. *United States*, 328 U. S. 61, 70.[2] As we said in *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 140–141:

> "There is no occasion here to regard the silence of Congress as more commanding than its own plainly and unmistakably spoken words. This is not a situation where Congress has failed to act after having been requested to act or where the circumstances are such that Congress would ordinarily be expected to act. . . . To find significance in Congressional nonaction under these circumstances is to find significance where there is none."

And see *Helvering* v. *Hallock*, 309 U. S. 106, 119–122. Compare *Mabee* v. *White Plains Publishing Co.*, 317 U. S.

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to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

"Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

"In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

"This announcement is not intended to affect the use of precedent elsewhere than in this House."

See generally, Stare Decisis in Contemporary England, 82 L. Q. Rev. 203 (1966).

[2] We have not been reluctant to reverse our own erroneous interpretation of an Act of Congress. See, *e. g.*, *Helvering* v. *Hallock*, 309 U. S. 106; *Nye* v. *United States*, 313 U. S. 33; *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118; *Commissioner of Internal Revenue* v. *Estate of Church*, 335 U. S. 632; *James* v. *United States*, 366 U. S. 213; *Smith* v. *Evening News Assn.*, 371 U. S. 195; *Local No. 438, Construction & General Laborers' Union* v. *Curry*, 371 U. S. 542, 552; *Fay* v. *Noia*, 372 U. S. 391, 435.

178, 185. Nor do we have here a precedent "around which, by the accretion of time and the response of affairs, substantial interests have established themselves." *Helvering* v. *Hallock*, *supra*, at 119.

Moreover, we need not be slaves to a precedent by treating it as standing for more than it actually decided nor by subtly eroding it in sophisticated ways. See Radin, The Trail of the Calf, 32 Cornell L. Q. 137, 143 (1946). It is enough that we do not approve "of the doctrinal generalization which the previous court used" (*ibid.*) and confine the precedent to what it actually decided. Certainly we should not extend the range of a precedent beyond its generating reason, especially when another policy, here the plain words of an Act of Congress, will be impaired by doing so.

I would affirm this judgment.

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